

**THE NORTHERN IRELAND LAW
REPORTS**

1943.



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THE
NORTHERN IRELAND
LAW REPORTS

CONTAINING
REPORTS OF CASES ARGUED AND DETERMINED
IN
THE HIGH COURT OF JUSTICE
AND ON APPEAL THEREFROM IN
THE COURT OF APPEAL
IN
NORTHERN IRELAND

EDITED BY
M. G. ELLISON,
ONE OF HIS MAJESTY'S COUNSEL.

1943

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Lords Justices of Appeal :

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THE RIGHT HON. EDWARD SULLIVAN MURPHY.

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THE HON. ROBERT DICK MEGAW.

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CORRIGENDUM.

Page 6. Headnote to DAVEY *v.* BYRNE. Delete "for life."

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KING'S BENCH DIVISION.

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

DUBLIN FINANCE CORPORATION LTD. v. ROWE.

K.B.D.
1942.

*Moneylender—Licensed to carry on business as moneylender in
Eire—Not licensed under Moneylenders Act (Northern Ireland),
1933—Loan made to defendant when resident in Eire—Action
against defendant when resident in Northern Ireland to recover
the money lent—Enforceability of contract in Northern Ireland.*

Oct. 23, 30.

The plaintiffs were licensed in Eire to carry on the business of moneylenders; they had no licence under the Moneylenders Act (Northern Ireland), 1933. When the defendant was residing in Eire the plaintiffs lent money to him there. In making the loan the plaintiffs complied with all the requirements of the law in Eire in respect of money-lending transactions. The defendant ceased to reside in Eire and removed to Northern Ireland. When the defendant was residing in Northern Ireland the plaintiffs sued him in Northern Ireland for the money so lent. All the procedural requirements of the Moneylenders Act (Northern Ireland), 1933, were complied with by the plaintiffs.

Held, that the plaintiffs were entitled to maintain the action.

SUMMONS for judgment.

The facts are stated in the judgment.

McVeigh for the plaintiffs.

The question for the Court is whether a money-lender licensed in Eire but not licensed in Northern Ireland can obtain judgment in the Courts of Northern Ireland.

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The application is made under Order 13, rule 17. Our procedure requires that the requirements mentioned in Order 3, rule 10, shall be complied with.

As was stated in the judgment of the Court of Appeal in *Nihalchand Navalchand v. McMullan* (1), there is in money-lending transactions an obligation upon the Court to observe the *lex fori*.

We have to satisfy the Court that there is no impediment in the *lex fori*.

In *Nihalchand Navalchand v. McMullan* (1), it was stated in the judgment of the Court: "We have nothing before us to show where the plaintiffs carry on their business, or in any way to exclude the money-lending Acts from consideration by the Court, and we think that the refusal to enter judgment in default of appearance was right."

In the present case the procedure laid down by the Moneylenders Act of 1933 has been followed.

Shrichand & Co. v. Lacon (2), established the principle that the Moneylenders Act, 1900, did not apply to a contract made in India and intended to be performed in India. Generally speaking the law of the place where the contract is made is *prima facie* that which the parties intended, and ought therefore to prevail in the absence of circumstances indicating a contrary intention. The Moneylenders Act does not apply to a contract for a loan made and intended to be performed abroad.

Provided the transaction was *bona fide* the defendants are not to be penalised by the fact that they are not licensed in Northern Ireland.

The law is correctly stated in *Halsbury's Laws of England* (Hailsham ed.) Vol. 23, page 201, note (c): "Although the Moneylenders Act, 1900, section 1, does not apply to moneylending contracts made and intended to be performed abroad (*Shrichand v. Lacon* (2), *Velchand v. Mannors* (3), and no relief under that Act can be obtained, a moneylender suing on such a contract in the English Courts must

(1) [1934] 1 K.B. 171, 177.

(3) [1909] 25 T.L.R. 329.

(2) [1906] 22 T.L.R. 245.

"satisfy the procedural requirements of the Money-lenders Act, 1927. Unless a plaintiff whose business is moneylending can establish that the Moneylenders Acts do not apply to the contract that he seeks to enforce and that the *lex fori* imposes no impediment to his success in his suit, he cannot succeed. "*Nihalchand Navalchand v. McMullan* (1)."

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In *London Finance and Discount Co. v. Butler* (2), it was held by Hanna, J., that where a person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, and does any of these acts within the Irish Free State, he must, in order to make his contracts legal and enforceable within the Irish Free State, comply in the Irish Free State with the provisions as to registration contained in the Moneylenders Act, 1900, section 2, sub-section 1 (a).

Hanna, J., however refrained from deciding the question whether if the transaction had been carried out in Northern Ireland, the plaintiff company could sue on it in the Irish Free State without having been registered there.

The plaintiffs did not advertise or carry on business in Northern Ireland and has never done so.

There was no appearance for the defendant.

Cur. adv. vult.

ANDREWS, L.C.J. : This is a summons for judgment in a moneylender's action brought to recover the sum of £106 12s. 0d. This sum includes the amounts alleged to be due for principal and interest, calculated at the rate of 39 per cent., upon three loans made on 7th August, 1941, 30th October, 1941, and 28th November, 1941, respectively. No appearance was entered by the defendant in the action: neither did he appear on this summons.

ANDREWS,
L.C.J.

The plaintiffs, who carry on business as moneylenders in Dublin, are licensed moneylenders under the Irish Free State (now Eire) Moneylenders Act, 1933; they are not licensed in Northern Ireland. At

(1) [1934] 1 K.B. 171.

(2) [1929] I.R. 90.

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the dates of the several respective loans the defendant was a citizen of Eire, where for about seventeen years he had been resident and employed as a ship agency manager. Recently the defendant came to reside in Belfast, though whether permanently or merely temporarily does not appear. Each contract was signed by the defendant and the transaction carried out at the plaintiffs' registered address in Eire, where it was also intended that the contract should be performed. It is further averred that the terms of the Eire Moneylenders Act, 1933, were duly complied with in each case. The plaintiffs do not advertise or carry on business in Northern Ireland, and have never done so.

The only point upon which I invited the assistance of counsel was whether the fact that the plaintiffs were unlicensed in Northern Ireland affected in any way their right to sue for and recover their debt in our Courts exercising jurisdiction over the area in which the defendant has come to reside. Such a result, I may say, appeared to me to be highly improbable, but it was necessary to be careful as the defendant did not appear. If such were the law I fear that the Border between Northern Ireland and Eire would be welcomed as providing blessings hitherto undreamt of for many impecunious and embarrassed citizens of both areas. It is true that Hanna, J., in the Irish Free State case of *The London Finance and Discount Co., Ltd. v. Butler* (1), to which Mr. McVeigh referred me, expressly left open the question whether if the transaction in that case had been carried out in Northern Ireland, where the plaintiffs were registered, they could sue on it in the Irish Free State without having been registered there. I do not know how far the learned Judge's doubts may since have been resolved by the Act of 1933, the provisions of which I have not examined. It is sufficient for me to consider the law in our own area. The Moneylenders Act (Northern Ireland), 1933, repealed for Northern Ireland, as did the Moneylenders Act, 1927, in England, the statutory provisions in regard to registration enacted by the Moneylenders (1) [1929] I.R. 90.

Act, 1900, and substituted for such registration a system of licensing. The obligation upon a moneylender to take out a licence is created by section 1 (1) of the Northern Ireland Act, 1933, which so far as is material, is in the following terms:—

“ Every moneylender, whether carrying on business alone or as a partner in a firm, shall take out annually in respect of every address at which he carries on his business as such, an excise licence . . . ”

It is transparently clear from a perusal of this section that the necessity for this excise licence only exists *in respect of an address* at which a moneylender carries on his business. If he does not carry on any business as a moneylender at any address in Northern Ireland, which is the present case, then there is no place in respect of which such a licence can be granted. In these circumstances, and with all the procedural requirements of the Act of 1933 duly complied with so as to satisfy the obligations of the *lex fori*, there can be no bar to such a moneylender, who is duly licensed in Eire, resorting to and obtaining relief in the Courts of Northern Ireland from a defendant who has necessarily submitted himself to its jurisdiction by coming into and being duly served with process in this area.

I shall accordingly give leave to enter judgment and shall allow interest at the rate claimed of 39 per cent. per annum.

Solicitors for the plaintiffs : *Porter, Morris & Co.*

J. McC.

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L.C.J.

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DAVEY v. BYRNE.

June 22.
July 2.

Will—Construction—Sole trustee—Trust for A. for life and on A.'s death the decision left to the trustee—Absolute gift to A.

Testator by his will appointed a sole executor and trustee. After providing for the payment of his debts and funeral and testamentary expenses, the testator directed that all his property should be held in trust for his sister for life and left to the trustee the ultimate decision with regard to the property on her decease.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.), that the testator's sister took an absolute interest in the property.

APPEAL from decision of Megaw, J.

James Joseph Byrne made his will, dated 25th January, 1937, on a printed form, as follows:—

“ This is the last will and testament of me, James
“ Byrne, of Groomsport, in the County of Down.
“ I hereby revoke all wills and codicils heretofore
“ made by me. I appoint Rev. Vincent Davey, of
“ Antrim, in the County of Antrim, and
“ of in the
“ County of , as my sole executor,
“ to be executor and trustee of this my will. I direct
“ that all my just debts and funeral and testa-
“ mentary expenses shall be paid as soon as con-
“ veniently may be after my decease. I give, devise
“ and bequeath unto Rev. Vincent Davey all my
“ property in trust for my sister, Ellen Byrne, and
“ the ultimate decision with regard to this property
“ on her decease I leave to him.”

Prior to the execution of his will the testator had declared to Rev. Vincent Davey that on the death of Ellen Byrne he desired him to hold the property on certain charitable trusts which he specified.

The testator died on 20th January, 1938, and probate of the will was granted to the plaintiff on 14th June, 1940.

On 14th February, 1941, Ellen Byrne died intestate leaving as her next-of-kin the same persons as were next-of-kin of the testator.

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v.
BYRNE.

An originating summons was taken out to determine upon the true construction of the will and in the events which had happened whether—

- (a) the will vested an absolute interest in the property in Ellen Byrne or only a life interest.
- (b) in the event of the Court determining that Ellen Byrne took a life interest, whether the beneficial interest in the remainder was vested in the executor.
- (c) whether the beneficial interest in the remainder was held in trust by the executor for the next-of-kin of the testator.
- (d) whether the remainder was vested in the executor upon certain charitable trusts.

McSparran for Rev. Vincent Davey.

MacDermott, A.-G. and *M. W. Gibson* for the Attorney-General for Northern Ireland.

Porter, K.C., for Edward Byrne who had been appointed to represent the next-of-kin of the testator.

McCall for James Davey, the administrator of the estate of Ellen Byrne.

The arguments of counsel appear sufficiently in the judgment of the Court.

The judgment of the Court was delivered by *Murphy, L.J.*

MURPHY, L.J. : This is a suit instituted by originating summons, which sought the decision of the Court on certain questions arising on the construction of the will of James Joseph Byrne, deceased. The will is dated 25th January, 1937, and the testator died on the 20th January, 1938. Probate was granted to the plaintiff, the sole executor, on 14th June, 1940, and Ellen Byrne, a sister of the testator, named in the will, died on 14th February, 1941, intestate.

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The will, as we were informed, was drafted by the plaintiff on a printed form, and the short clause on which the questions arise reads as follows: "I give
"devise and bequeath unto Rev. Vincent Davey all my
"property in trust for my sister Ellen Byrne and the
"ultimate decision with regard to this property on
"her decease I leave to him."

We were informed that the next-of-kin of the testator, of whom the plaintiff is one, and of Ellen Byrne, are the same persons.

On the hearing of the originating summons Megaw, J., by order dated 18th May, 1942, appointed Edward Byrne, one of the defendants, to represent the next-of-kin of the testator, and, in answer to the questions submitted to him, ordered that, on the true construction of the clause already referred to, an absolute interest in the property of the testator was vested in Ellen Byrne, and that accordingly the other questions did not arise.

An appeal against this order was brought by the Attorney-General, who claimed that this order should be reversed, and that in lieu thereof it might be ordered that there was vested in Ellen Byrne a life interest in the property of the testator, and that the remainder was vested in the plaintiff upon certain charitable trusts.

In the course of his, most helpful, argument the learned Attorney General was proceeding to open an affidavit made by the plaintiff (which is read on the order of Megaw, J.) but objection was taken by Mr. Porter, K.C., on behalf of the defendant Edward Byrne, to the admissibility of portions of this affidavit, as they set forth conversations between the testator and the plaintiff at the time of the drafting of the will, and, at this stage, the Attorney-General did not contend that the portions objected to were admissible. At a later stage of the appeal, when the Attorney-General was arguing that the property was held by the plaintiff on certain charitable trusts, this affidavit was read by him as containing the only evidence of these secret trusts, and we desire to express our opinion that in so far as it attempts to prove the intention of

the testator the affidavit is clearly inadmissible. There is a fundamental difference between evidence explanatory of the words of a will themselves and evidence sought to be applied to prove intention itself as an independent fact (see *Higgins v. Dawson* (1).)

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The learned Attorney-General argued that taking this extremely ill-drawn clause as a whole, and having regard particularly to the words "this property" and "on her decease," Ellen Byrne only took a life interest in the property, and that the question whether an absolute interest was cut down by subsequent words did not arise. He did not question the settled rule of construction that a clear gift is not cut down by anything subsequent in the will which does not with reasonable certainty indicate the intention of the testator to cut it down, but referred us to *Randfield v. Randfield* (2), as an authority for the proposition that a Court should not institute a "comparison as to lucidity" between an earlier and a later clause. He also referred us to *In re Jones* (3), *In re Sanford* (4), *re Russell* (5), *Comiskey and Others v. Bowring-Hanbury and Another* (6), and *In re Cammell* (7), but, on consideration, we do not think that any of these cases afford assistance in the effort to arrive at the true construction of the remarkable words of the clause under discussion.

On behalf of the defendant James Davey—the committee of the person and estate of Ellen Byrne (who had been declared a person of unsound mind by order, dated 23rd June, 1939), and administrator of her estate—Mr. McCall, in an argument which was as succinct as it was clear, submitted that the earlier words of the clause constituted an absolute gift to Ellen Byrne and that the following words represented an attempt on the part of the testator to impose on that absolute interest a restriction on alienation which was repugnant to the absolute character of the earlier gift. He also submitted that the mere fact

- | | |
|------------------------------------|---------------------|
| (1) [1902] A.C. at p. 8, 9 and 10. | (5) 52 L.T. 559. |
| (2) 8 H.L.C. 225. | (6) [1905] A.C. 84. |
| (3) [1898] 1 Ch. 438. | (7) [1925] W.N. 36. |
| (4) [1901] 1 Ch. 939. | |

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that a gift is given in trust for a beneficiary will not deprive this gift of its absolute character when the beneficiary is *sui juris*, and he referred us to the decision of Sir A. Porter, M.R., in *Clancy v. O'Callaghan* (1).

We are of opinion that the words: "I give devise and bequeath unto Rev. Vincent Davey all my property in trust for my sister Ellen Byrne" would clearly amount to the gift of an absolute interest in this property to Ellen Byrne, unless this, *prima facie*, meaning of the word is affected or controlled by the subsequent words of the clause. As to the effect of these latter words, Mr. McCall submitted that if they did not represent an ineffectual attempt to impose restrictions on an absolute gift, they might represent an attempt to delegate a power of testamentary disposition to be exercised on any balance of the property remaining on the death of Ellen Byrne. He argued that these subsequent words were "vague, inept and ambiguous" (to which epithets Mr. Porter added "nebulous"), that there was no gift to the executor in these words, and no direction that the property should be disposed of among charitable objects. He further argued that in any case cited in favour of the Attorney-General's contention the subsequent words were sufficiently clear in themselves to constitute a valid gift.

In reply, the Attorney-General submitted that the argument on behalf of the respondents would, in effect, delete the words "on her decease" from the clause, that the plain meaning of the entire clause was that the interest given to Ellen Byrne ceased on her death, and that on her death the plaintiff was given an absolute power of disposition over the property. In support of the "secret trust" in favour of charities he referred (as above stated) to the plaintiff's affidavit and cited a number of authorities in favour of his argument that the plaintiff took the property beneficially and subject to the secret charitable trust declared in this affidavit; while, alternatively, he submitted that even if he took it as executor he would not hold it as trustee

(1) [1897] I.I.R. 290.

for the next-of-kin of the testator but on the charitable trust declared by the testator before the execution of the will.

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Having regard to the view which we have formed on the construction of this clause it is not necessary to consider the remarkable conflict between the two decisions of the English Court of Appeal, viz., *Howell's Estate* (1), and *Chapman's Estate* (2), the decision of Megaw, J., in *Duffy v. Duffy* (3), or the speeches of Lord Buckmaster and Lord Sumner in *Blackwell v. Blackwell* (4), but we desire to say that we express no opinion on the question whether or not an issue as to a secret trust would be properly determined on an originating summons rather than in a plenary suit. We need only say that the plaintiff's affidavit emphasizes the desirability of oral evidence and cross-examination as to the existence and nature of the alleged secret trust.

It is not surprising that the industry of counsel has not succeeded in discovering any reported case in which words resembling those to be found in the latter part of this clause have formed the subject of decision. Looking at the clause it is clear that, standing by themselves, the earlier words: "I give
"devise and bequeath unto Rev. Vincent Davey all
"my property in trust for my sister Ellen Byrne" constitute a gift of an absolute interest in the testator's property to his sister, and notwithstanding the learned Attorney-General's argument it appears to us that the real question for decision is whether or not this apparently absolute interest is reduced ("cut down") to a life interest by the subsequent words of the clause. Whether one adopts the words of Lord Campbell in *Randfield v. Randfield* (5): "If there be a clear gift,
"it is not to be cut down by anything subsequent which
"does not with reasonable certainty indicate the
"intention of the testator to cut it down"; or those of Turner, L.J., in *Lady Langdale v. Briggs* (6), adopted

(1) [1915] 1 Ch. 241.

(4) [1929] A.C. 318.

(2) [1922] 2 Ch. 479.

(5) 8 H.L.C. 225.

(3) [1941] N.I. 180.

(6) 8 D.M.&G. 429.

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L.J.

by Lopes, L.J., in *Leslie v. Earl of Rothes* (1): "Regard
"is also to be had to the rule that an estate well
"created is not to be taken away by doubtful or
"equivocal expressions"; or those of Kay, L.J., in
Leslie v. Earl of Rothes (1): "It is a prominent canon,
"of construction that words which divest a gift
"clearly given should be as clear as the words which
"confer it"; it seems that before effect could be given
to the argument that Ellen Byrne only took a life
interest in the property, there must be at least a
reasonable certainty as to the intention of the testator
as expressed in the later words of the clause. We
have listened with care to the arguments and cannot
avoid the conclusion that these words are "inept"
and "nebulous," and that far from indicating the
testator's intention with reasonable certainty they
are admirably suited to conceal any such intention.
We must therefore give effect to the clear words in
the first part of the clause and hold that under them
Ellen Byrne took an absolute interest in the property
of the testator.

I should add that if we were to accede to the argu-
ment of the Attorney-General that this will in terms
only confers a life interest on Ellen Byrne it would by
no means follow that the property would go to the
Rev. Vincent Davey impressed with a secret trust.
Before a secret trust can attach to property be-
queathed by will it must be shown that there is an
absolute gift to the person alleged to be bound by the
secret trust, either beneficially or on trusts undisclosed.
There is no such gift in this will, the language in which
it is said to appear being ambiguous and uncertain.
On the assumption, therefore, that Ellen Byrne took
a life interest only, and the alleged gift over being
ineffectual, there would be an intestacy upon her
death and the property would go to the next-of-kin
of the testator. As these next-of-kin are also the
next-of-kin of Ellen Byrne no contest can arise between
this latter construction and the one which we hold to
be the true one, namely, that Ellen Byrne took an

(1) [1894] 2 Ch. at p. 515, 516.

absolute interest. Accordingly this appeal will be dismissed and the order of Megaw, J., affirmed.

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Solicitors for plaintiff and respondent: *Joseph Donnelly & Co.*

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Solicitor for His Majesty's Attorney-General for Northern Ireland: *Charles Thom.*

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Solicitors for Edward Byrne: *Wm. Alexander & Sons.*

Solicitor for James Davey: *Hugh P. O'Kane.*

M.W.G.

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Oct. 26.
Nov. 22.

MACDONALD, APPELLANT;
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Valuation—School-house used to provide secondary education for children of parents in comparatively humble circumstances—School carried on at a loss—Evidence of loss—Valuation (Ireland) Act, 1852 (15 & 16 Vic., c. 63), secs. 11 and 12.

A school-house was held by trustees for the purpose of carrying on a secondary school for the children of people in comparatively humble circumstances. The income was derived from endowments, grants from the Ministry of Education, and pupils' fees. By the terms of the trust the trustees were precluded from making any profit out of the school, and any surplus of income over expenditure was to be expended and applied for school purposes. It was also required that "free places" should be awarded to at least two pupils each year. In the year 1941 most of the pupils available for the school could not pay fees, and the number who held "free places," awarded by examination substantially exceeded the number of those who paid fees. As a result of that and other causes the income of the school ceased to be sufficient to meet the expenses. On an appeal by the trustees against the valuation of the premises the County Court Judge in determining the valuation took into account the loss in the carrying on of the school for the year ending July, 1941.

Held, that evidence that the school had been carried on at a loss ought not to have been received in ascertaining the rateable value of the premises.

CASE STATED by the County Court Judge of Tyrone.
The facts appear in the judgments.

Warnock, K.C., and *Miller* for the Commissioner of Valuation :—

It has never been contended that this school is a charity. Neither profit nor loss should be taken into account; the County Court Judge has not stated what the other factors were which he took into account. The County Court Judge has found that the school is precluded from making a profit, that the Governors cannot carry on the school as a profit-making undertaking, that the premises are not suited for any other

purpose, and that the respondents are the only possible tenants.

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There are certain cases where the profits made in the premises can be considered in fixing the valuation, but the present is not such a case.

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In *The Queen v. School Board for London* (1), the Court of Appeal in England held that in assessing to the poor rate schools occupied by a school Board, which can make no profit in a commercial sense, as tenant of the schools, the school Board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the Board might reasonably be expected to pay for the premises for use as schools. In that case Bowen, L.J., said at page 741: "It does not matter whether the School Board wants the premises for the purpose of profit, or will make a profit out of them, the question is whether the School Board wants and would take them."

Bowen, L.J., was prepared to exclude the question whether the School Board occupied the premises for the purpose of making a profit or would make a profit out of them. The question of a legal inhibition on a particular occupier is not to be considered. The principle established in that case was followed in *Enniskillen Rural District Council v. The Commissioner of Valuation for Northern Ireland* (2).

The passage from Lord Birkenhead's opinion in the House of Lords in *Port of London Authority v. Assessment Committee of Orsett Union* (3), quoted by Moore, L.C.J., in his judgment in *Enniskillen Rural District Council* (2), applies to the present case.

In *Dodds v. Assessment Committee of Poor Law Union of South Shields* (4), Lord Esher said in his judgment: "The question is not what a tenant would give for the business carried on in the house or tenement, it is what he would give by way of rent for the house or tenement itself." That case has been commented on in *Cartwright v. Sculcoates Union* (5), where

(1) 17 Q.B.D. 738.

(4) [1895] 2 Q.B. 133.

(2) [1937] N.I. 86.

(5) [1899] 1 Q.B. 667.

(3) [1920] A.C. 273, 284.

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the arbitrator considered the profit-earning capacity of the business in question and the Court of Appeal held that he was perfectly right in so doing.

We rely on the words used by the Earl of Halsbury, L.C., at page 674. This decision was affirmed by the House of Lords (1) who held that to arrive at the proper value it must be considered what the hypothetical tenant would give, including the tied-house tenant himself. That is clear from the words used by Lord Morris at page 155. This law applies to business premises only. To fix valuation on profits would be to introduce a very unreliable element.

We rely on the words used by Scott, L.J., in *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (2), at page 470.

Whatever circumstances would affect either the landlord or the tenant in making the bargain are to be taken into account.

In the present case it is not found that the 114 free places are awarded as a matter of charity. If the child reaches a certain level he is educated free. If he does not reach that level he pays either £6 or £8 per year. The Governors of the school are giving education free. They are not bound to do so, they are limiting their own user of the premises. If the clever boys were charged fees just as the backward boys are the situation would be altered. The Governors are not precluded from charging the same fees to the clever pupils as were charged to the backward ones

T. J. Campbell, K.C., and McSparran for the respondents :—

The County Court Judge considered the profits, and while considering the profits, he also took into consideration the deficit for the year ending July, 1941; he was never asked to consider loss only.

The decision in the *Enniskillen Rural District v. The Commissioner of Valuation for Northern Ireland* (3), does not justify the argument for the Commissioner

(1) [1900] A.C. 150.

(3) [1937] N.I. 86.

(2) [1937] 2 K.B. 445.

in the present case that profits should not be considered.

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Lord Morris, in the House of Lords, decided in *Cartwright v. Sculcoates Union* (1), at page 154, that profits should be considered.

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There are three methods of arriving at a valuation : (1) the comparative method, (2) the cost method, and (3) the profits method. No other method than (3) could be applied in the present case.

In *Napier and McVeigh's Law of Valuation* it is stated at page 41 that : " There seems to be some " conflict of opinion, at least in the case of public houses, " as to how far it is permissible to put in evidence and " consider the amount of trade actually being done " on the premises and the profits made. In *Dodds v. South Shields Union* (2), it was held that where " evidence of the valuation of similarly situated " premises was available, evidence of profits was " inadmissible. But in *Cartwright v. Sculcoates Union* (3), the House of Lords held that inquiries " as to profits are permissible in most, if not in all " cases. It was considered that the occupier could " not be compelled to give information as to his profits, " but was entitled to give such evidence if he so " desired."

It does not seem that the loss for the year ending July, 1941, was the determining factor in inducing the County Court Judge to fix the valuation of the hereditament at £135. This loss was only one factor among others. The County Court Judge was, as he said, not precluded from considering the question of loss.

In *The Queen v. Verrall* (4), it was held by the Queen's Bench Division that upon appeal to sessions against a rate in respect of premises occupied as a racecourse, the respondents have a right to call for the production, and upon non-production, to prove the contents of the appellants' books of account as an element in ascertaining the rateable value of the occupation.

(1) [1900] A.C. 150. (3) [1899] 1 Q.B. 667 ; [1900] A.C. 150.

(2) [1895] 2 Q.B. 133. (4) 1 Q.B.D. 9.

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In *Clark v. Fisherton-Angar* (1), the refreshment rooms on a railway station having been let to a contractor for a term of years at a fixed annual rent, he appealed against a poor rate made upon him as occupier of the premises, and at the hearing of the appeal sought to prove by his own testimony and by his account books showing the receipts and expenditure during the past year in respect of the refreshment rooms, that the business was carried on at a loss, and that the rent received did not represent the true annual value of the premises. It was held by the Queen's Bench Division that such evidence ought to have been received as an element in ascertaining the rateable value.

The decision in *Dodds v. The Assessment Committee of Poor Law Union of South Shields* (2), has not always met with approval.

In *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (3), Collins, L.J., said at page 152: "It is clear, therefore, that it cannot be laid down as a matter of law that profits cannot be looked at in ascertaining rateable value." Receipts and expenditure may show that the value by the ordinary tests is not satisfactory.

In *Cartwright v. Sculcoates Union* (4), it was decided by the House of Lords that evidence of profits made is admissible.

Lord Morris, at page 155, said in his judgment: "It is true that the best way of ascertaining what the trade was which was going on would be the production of the books of the then tenant; but that was objected to. It is suggested that the case of *Dodds v. South Shields Union* (2) decided that that is improper evidence. If it so decided, I can only say that I entirely disagree with it, and not being bound by it here, as the Lord Chancellor was when sitting in the Court of Appeal---if it goes that length I am entirely of an opposite opinion."

We also rely on the opinion of Lord Shand in *Cartwright v. Sculcoates Union* (4), at page 156.

(1) 6 Q.B.D. 139.

(2) [1895] 2 Q.B. 133.

(3) [1900] 1 Q.B. 143.

(4) [1900] A.C. 150.

In *Ryde on Rating* (6th Edit.) it is stated at page 211 :
 " It is submitted that the true rule is as follows :—
 " As a matter of law, profits must be regarded as
 " affecting rateable value, just so far as those profits
 " would as a matter of fact, affect the rent which may
 " reasonably be expected. In ascertaining how much
 " net rent such or such an occupation may be expected
 " to command, parish officers are to consider, not drily
 " and only, what would legally pass by a demise of it,
 " but all the existing circumstances, whether per-
 " manent or temporary, wherever situated, however
 " arising or secured, which would reasonably influence
 " the parties to a negotiation for a tenancy, as to the
 " amount of rent to be asked or given."

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In *Cartwright v. Sculcoates Union* (1), Lord Halsbury, L.C., speaking of a public-house, said at page 673 :
 " The problem is to ascertain what a tenant from year
 " to year might reasonably be expected to give as
 " rent. For the solution of that problem . . . all
 " that could reasonably affect the mind of the intending
 " tenant ought to be considered."

In *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (2), Lord Halsbury, L.C., said at page 182 : " To go into the amount of profits and
 " losses as if you were finding out what a man's income
 " is would be absolutely irrelevant ; but for the purpose
 " of ascertaining what a tenant would be likely to
 " give, to suggest that that is something which in
 " point of law you have no right to inquire into would
 " be equally absurd. All the circumstances of the
 " particular occupation, the mode in which the trade
 " is being carried on, and the circumstances affecting
 " either the restriction or the amplitude of the trade,
 " are all legitimate subjects of inquiry."

[They also referred to *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (3).]

Warnock, K.C. (in reply) :—

The question is whether it is in the power of The Board of Governors by their policy in regard to education to affect the valuation of the school.

(1) [1899] 1 Q.B. 667.

(3) [1937] 2 K.B. 445.

(2) [1901] A.C. 175.

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The accounts do not represent the affairs of a person who is trying to make money. As the Governors are not trying to make a profit the County Court Judge should not look at the accounts at all, for they are not relevant. The accounts do not give any indication of what a hypothetical tenant might give for the premises. The Court has none of the factors before it which would lead it to come to any conclusion as to what a hypothetical tenant would give. The profit basis has never been applied to such a valuation. The whole motive of profit-making is absent, and therefore the basis is entirely different.

Cur. adv. vult.

ANDREWS,
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ANDREWS, L.C.J.: This matter comes before us upon a Case Stated by the County Court Judge of Tyrone, on the hearing of a Valuation appeal. The premises in question consist of a certain house, school and grounds, known as St. Patrick's Academy, situate at Dungannon and comprising 4a. 2r. 22p. This school is a secondary day school for boys and girls. The property is vested in trustees, and is held by them under lease for ever, dated 4th March, 1899. The school buildings, erected about the year 1902, are not laid out on modern lines, and without considerable alteration would not be suitable for any other purpose. The appellant is the Chairman of a Board of Governors which manages and controls the school. The Governors are required by the terms of their trust to award a minimum of two "free places" per annum to pupils; but, they have placed such a generous interpretation upon their powers and duties in regard to free education that in 1941 the number of pupils who held "free places" substantially exceeded the number of those who paid fees. Indeed, no less than 114 out of the 144 pupils at present in the school hold "free places," such places being awarded by non-competitive examination. The trustees are precluded from making a profit in the commercial sense out of the school; and, accordingly, the surplus of income, if any, over expenditure in any year must be expended and applied for school purposes.

Accounts which were produced and received in evidence showed that for the year ending July, 1941, there was a deficit of £295 17s. 7d. as compared with a surplus for the previous year of £27, and with an average surplus for the previous five years of £100 a year. Expert evidence for the appellant placed an annual value on the entire premises of £132; and the County Court Judge accepts the testimony before him that there was no room in the locality for another secondary school catering for the same class of pupils; that the class of pupils available for the school could not pay the fees which it would be necessary to charge to make the school a paying proposition; and that the school was not carried on as a commercial undertaking, but to provide a sound secondary education for pupils whose parents are in comparatively humble circumstances. The estimate of value given on behalf of the Commissioner was £155, in arriving at which the question of profit or loss in previous years was disregarded.

The learned County Court Judge, in fixing the valuation of the hereditament at £135—a reduction of £20 from the figure for the previous year—says that in doing so he took into account “along with other factors,” which he does not specify, the loss in the carrying on of the school for the year ending July, 1941; and the net question submitted to us is whether he was right in taking this deficit into account.

The duty of the Court in arriving at the valuation of a hereditament arises under section 11 of the Valuation (Ireland) Act, 1852. The question to be determined is the true estimate of the net annual value of the hereditament. This figure, so far as land is concerned, is to be ascertained with reference to the average price of agricultural produce as therein specified; and as regards houses and buildings the criterion is the rent for which, one year with another, the same might in its actual state be reasonably expected to let from year to year, the outgoings therein mentioned being paid by the tenant. Hence arose the formula which is to be found so frequently in the reports of the principal authorities—“what would the

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"hypothetical tenant from year to year be likely to give for the hereditament"? One must assume the property to be let. It is quite immaterial that it is in the occupation of the owner; in such case one must assume it to be let. Further, all possible occupiers, including the actual occupier, must be taken into account as possible tenants from year to year. The right to include such actual occupier was clearly established in *The Queen v. School Board for London* (1), in which Bowen, L.J., expressed the matter succinctly and, as it seems to me, in a manner which must carry conviction, when he said that the case could not fairly be decided on the hypothesis that the one person who wants the premises most would not take them.

There is another relevant point upon which it should be made clear that the law as originally laid down has undergone material change. It was at one time considered that in order to create a *liability* for rates, occupation must be shown to be "beneficial" in the sense of being "profitable." This doctrine, which was severely questioned in *Jones v. Mersey Docks* (2), was finally disposed of in subsequent cases, including the decisions of the House of Lords in *The London County Council v. Erith and West Ham* (3), and *West Kent Main Sewerage Board v. Dartford Union* (4). It is now well established that "beneficial occupation" does not connote pecuniary profit. This change in the law was recognised by this Court in *Enniskillen Rural District Council v. Commissioner of Valuation for Northern Ireland* (5) (valuation of water undertakings); but for our present purposes I again turn to the judgment of Bowen, L.J., in *The Queen v. School Board for London* (1), at p. 741, where he said: "It does not matter whether the School Board wants the premises for the purpose of profit, or will make profit out of them; the question is whether the School Board wants and would take them." Fry, L.J., expressed precisely the same view in the words: "It does not by any means follow that because there is no profit there is no value."

(1) 17 Q.B.D. 738.

(2) 11 H.L.C. 443.

(3) [1893] A.C. 562.

(4) [1911] A.C. 171.

(5) [1937] N.I. 86.

Case after case might be cited in which this now well established principle has been acted upon ; but it will suffice to refer to the first of several propositions of rating law enunciated by Lord Birkenhead, L.C., in *Port of London Authority v. Assessment Committee of Orsett Union* (1), at p. 284 : " The question of rate-ability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament ; it depends on whether the occupation is of value." This passage was cited by Moore, L.C.J., in the *Enniskillen case* (2), at p. 96, and formed the basis of the decision of the Court.

Whilst rent, not profit, must therefore be taken as the measure of rateable value, I am not, however, to be understood as holding that the question of profits is in all cases irrelevant when the issue is one as to the *amount* of the valuation. When dealing with a hereditament upon which business premises have been erected and in which a business is conducted upon a profit-making basis it is quite legitimate in certain circumstances to have regard to profit, not for the purpose of rating any particular profit, but in order to find out what the hypothetical tenant would be likely to give to have the opportunity of making that profit. In such case, however, it is profit-earning capacity which must be considered rather than the actual profits or losses of any particular year. It is the facility for making trade profits in a particular hereditament which affects and, in a measure, determines its value for rating purposes, whereas actual profits may reflect the knowledge, skill, and business capacity of the particular occupier. This is the general rule, and it is only in exceptional cases that evidence may be given not merely of the profits which a tenant may be expected to make but of the actual profits which a particular occupier in fact makes. This is the view expressed by the editors of *Ryde on Rating*, 6th Edit., at p. 216, where the relevant authorities are collected and reviewed.

These considerations as to actual profits, however, appear to me to be wholly inapplicable to a case such

(1) [1920] A.C. 273.

(2) [1937] N.I. 86.

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as the present in which the motive actuating the Governors of the school is not how much profit they can make out of the school, but how best they can discharge their duty, regardless of profit or loss, in the interests of education, and in particular of the class of young persons living in the locality for whose benefit such school was designed and intended by its founders. It would seem to me in such a case to be quite illogical and legally indefensible to make the actual profit or loss of any year the criterion or even a factor in determining the valuation of the hereditament. In my judgment, when the motive to make a profit does not exist, evidence as to actual profits or loss would be dangerous, irrelevant, and, as such, legally inadmissible.

BROWN, L.J. BROWN, J. : I agree with the judgment just delivered by the Lord Chief Justice.

It is to be noted that what is to be valued is the hereditament itself—the actual house or other property for the occupation of which the occupier is to be rated. Some hereditaments have a higher value on account of their profit earning capacity. A public house at the junction of two important thoroughfares may be rated higher than one of similar size situated down a side street.

Most of the cases to which we have been referred on the question of profits and losses are cases of a commercial undertaking where the underlying motive was the making of profits. The premises in this case are not worked for profit. They are used as a school to provide secondary education for poor children and under the trusts the governors are prohibited from applying any profit that may be made otherwise than for the benefit of the school. The income of the school is derived from (a) fees paid by students; (b) endowments; and (c) grants from the government.

Under the Trust at least two free places must be provided annually by the governors. In July, 1942, free places were held by 114 pupils.

For a number of years prior to 1941 the school had been carried on at a profit which had been invested

and the income from such investment added to the school funds. In the year 1940 there was a surplus of £27. In the year 1941 there was a deficit of over £295. The income from endowments in 1941 was £110 less than in 1940. There is no evidence that the grants from the government in 1941 were less than in 1940. How exactly this profit of £27 in 1940 is turned into a loss of £295 in 1941 does not appear ; but it would seem to be a result of the mode of management of the school. 114 free places out of a total of 144 pupils is a big burden for any school to bear.

In fixing the valuation the County Court Judge took into account the loss in the carrying on of the school for the year 1941. I assume that he also took into account that for several years before 1941 the school had been carried on at a profit.

I am of opinion the Judge was wrong in considering the amount of the loss in 1941. This school is not a commercial undertaking seeking to make profits. The governors are carrying out their trusts without regard to profit.

The test of the valuation of the hereditament is : What rent would a tenant give one year with another for this hereditament to carry out the trust ? In estimating that rent the profits that may be made do not affect the rent and should not be considered in assessing the valuation of the hereditament. The profits earned in any one year do not depend upon the profit capacity of the hereditament but upon the policy pursued by the Trustees. Such policy might result in a very much greater loss than that incurred in 1941 but to my mind the value of the hereditament would be unaffected.

Solicitor for the appellants : *J. H. Donnelly.*

Solicitor for the respondent : *F. C. MacNeice.*

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Assize Court.
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HUGH MACK & COMPANY LTD. v.
BURNS & LAIRD LINES LIMITED.

Oct. 20, 23,
Nov. 3.

Carriers by sea—Liability of—Contract limiting liability—Whether a bill of lading or similar document of title—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, cap. 22), Schedule, Article VI.

The plaintiffs delivered goods to the defendants in Belfast for conveyance by them to a consignee in Scotland. The form of receipt which was signed by an agent of the plaintiffs on delivery of the goods to the defendants was marked "not negotiable" and contained conditions which purported to exempt the defendants from all liability in the event of the loss of the goods or of any damage thereto arising in any manner whatsoever.

The goods were lost in transit and no explanation of their disappearance was given by the defendants. The plaintiffs sued the defendants for the value of the goods

Held, by Murphy, L.J., that the Carriage of Goods by Sea Act, 1924, applied, and that the defendants were only entitled to limit their liability as provided by Article VI of the Schedule to the Act as modified by section 4, and that the conditions of the contract were "contrary to public policy" and void under the Act.

APPEAL by the plaintiff from the dismiss of a Civil Bill claiming £35 damages for the loss of goods delivered to the defendants to be carried by them.

The facts appear in the judgment.

Porter, K.C., for the plaintiffs.

Fox, K.C., and *M. W. Gibson* for the defendants.

MURPHY, L.J., reserved judgment.

MURPHY,
L.J.

MURPHY, L.J.: In this case the plaintiffs, Messrs Hugh Mack & Co., of 19 Donegall Street, Belfast, claim £35 against the defendants, the Burns & Laird Lines Ltd., for the loss of a bale of goods consigned by them to one of their customers, J. C. Geddis, Ltd., Galashiels. This bale was despatched by the plaintiffs for carriage by the defendants on 24th December, 1941, and Mr. David Mack proved that this bale since

it was so despatched had never been received by the consignees or returned to the consignors ; while a letter from the defendant company was put in, dated 12th March, 1942, stating "The bale has not yet been traced and is presumed lost." No explanation of the loss of the bale was given by the defendants, who relied on the conditions under which, they say, the bale was received by them for carriage, and which, they say, exempt them from any liability for its loss or disappearance. These conditions are incorporated in a "receipt" marked "not negotiable," which "receipt," it is agreed, was signed on behalf of the plaintiffs.

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When the appeal was first argued before me I intimated that if I needed further assistance from counsel I should ask them to amplify their arguments. At this first argument the Carriage of Goods by Sea Act, 1924, had not been referred to on either side, and on consideration of that Act I thought it desirable that counsel should be heard as to its effect. Accordingly, Mr. Porter, K.C., for the plaintiffs, and Mr. Fox, K.C., for the defendants, submitted to me on the adjourned hearing arguments as to the construction and effect of this Act, and in effect both counsel agreed that it did not apply to the present case ; Mr. Porter basing his view on a general consideration of the sections of and schedule to the Act, while Mr. Fox referred me to the very important decision of the First Division of the Court of Session in *Harland & Wolff, Ltd., v. The Burns & Laird Lines Ltd.* (1). Mr. Fox handed me the copy of No. 40 Lloyd List Reports from which he cited the case, but having found the case reported in the authoritative Sessions Cases Reports, I consider that this is the report to which I should refer. I may say that I have compared the two reports and find that the judgments as reported are identical.

The present appeal is, I was informed by Mr. Porter, brought as a "test case," but I was not asked by either counsel to state a case, so that I must give the parties my unaided judgment, and at the same time express the hope that the same point may be considered by the Court of Appeal in some other case.

(1) [1931] S.C. 722.

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Before I consider the Act of 1924, I should state my clear opinion that if this Act has no application to the case, the plaintiffs' claim must fail. It has always been regarded as settled law that, while a shipowner in the absence of express exceptions in his contract of carriage was in the position of a common carrier, and so absolutely bound to deliver the goods at their destination in the same condition in which they were entrusted to him, unless the damage was caused by the Act of God or the King's enemies or the inherent defects of the goods themselves, he, the shipowner, could protect himself against liability if the goods were carried under suitably framed conditions of carriage. No questions arose as to the "reasonableness" of such conditions: shipowners, or carriers by sea, not being subject to the restrictions imposed by statute on railway companies (Railway & Canal Traffic Act, 1854, section 7.). This principle appears to me to be axiomatic, and for this reason it seems to be difficult to find any reported cases in which it has been precisely enunciated, but it is the basis on which numerous cases were decided (of which *Devitt v. Glasgow, etc., Steam Packet Co., Ltd.* (1), *Spence v. The Laird Lines, Ltd.* (2), *Taylor v. Liverpool, etc., Steam Co.* (3), *Tattersall v. National S. S. Co.* (4), *Steel v. State Line S. S. Co.* (5), and *Joseph Travers & Sons Ltd. v. Cooper* (6), are examples), and, as Mr. Fox pointed out, Andrews, J., in *Devitt's case* expressly refers to the principle as well settled. The opinion of the text writers may be conveniently represented by the article on Shipping and Navigation, in *Halsbury's Laws of England*, Vol. 30, Hailsham Ed., par. 765, page 606.

The conditions embodied in the "Not Negotiable Receipt" in the present case are so wide as to protect the defendants from liability under any conceivable circumstances—this indeed was the ground on which Mr. Porter argued that they must be treated as void, because if they applied the defendants, who had taken

(1) 29 I.L.T.R. 30.

(2) 49 I.L.T.R. 193.

(3) L.R. 9 Q.B. 546.

(4) 12 Q.B.D. 297.

(5) 3 App. Cas. 72 at p. 88.

(6) [1915] 1 K.B. 73.

the plaintiffs' goods for carriage, were under no liability whatsoever to the plaintiffs as carriers. He argued, therefore, that the alleged "contract" should be disregarded, and that the defendants were liable as bailees and not protected in any way against liability. However attractive the argument may appear, I cannot find any legal warrant for it. In the absence of any statutory restriction I cannot see why a carrier should not accept goods on conditions which in plain language will amount to this: "I will receive your "goods for carriage and the freight shall be so much, "but only on the express condition that if these "goods are damaged or lost you shall have no claim "against me, whatever may have been the cause of "such damage or loss." In normal times goods entrusted to carriers by sea (as by land) are safely delivered in the vast majority of cases, and the shipper is primarily interested in the amount of the freight rather than the conditions of carriage. He, the shipper, can protect himself against loss or damage by insurance, but in the coasting trade I should suppose that in many cases, as in the present, no insurance is ordinarily effected.

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If the validity of the conditions of carriage were to depend on the view which a judge should take of their reasonableness, I think that this principle (which would run counter to the ordinary principles of contractual relationship) must have formed the subject of some reported decision. Mr. Porter has not been able to refer me to any such decision, nor have I been able to discover one, while, as I have said, the contrary principle is clearly the basis on which a great number of cases have been argued and decided, and has been explicitly stated by Andrews, J. Unless, therefore, the common law has been altered by statute, I must hold against the plaintiffs and affirm the dismissal.

Again it appears to me that save the Carriage of Goods by Sea Act, 1924, there is no other statute applicable to this case. I therefore approach the consideration of what I shall hereafter refer to as the Act of 1924. As to the general effect of the statute I refer to the words of Lord Sumner in his speech in

Assize Court. 1942. *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.* (1): "The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain under which he shall be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption." In that case the goods, tinplates, were shipped under a bill of lading.

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Again, Lord Macmillan in *Stag Line Ltd. v. Foscolo Mango & Co.* (2), says (when dealing with the rules in the Schedule to the Act of 1924): "As these rules must come under the consideration of foreign Courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date but rather that the language of the rules should be construed on broad principles of general acceptance."

Prima facie, section 1 of the Act would appear to bring the Rules contained in the Schedule into operation in relation to all contracts for the carriage of goods by sea from any port in Great Britain or Northern Ireland to any other port, but Article V. provides that "the provisions of these Rules shall not be applicable to charter parties," while the definition of "contract of carriage" in Article I. provides that the term "only applies to contracts of carriage covered by a bill of lading or any similar document of title." As pointed out in Temperley's most useful textbook on the Act (which I have read through the courtesy of Mr. McKinty) at p. 9: "Contracts for the carriage of goods by sea necessarily fall into two classes: first, contracts where a shipper is stipulating to have his particular parcel of goods carried to its destination, to which type of contract the appropriate kind of formal document is a bill of lading or other receipt

(1) [1929] A.C. 223 at p. 236. (2) [1932] A.C. 328 at p. 350.

“embodying the conditions of carriage; secondly, contracts where what is stipulated for is the use of a ship for a named voyage (or a named period of time) with a cargo as prescribed, the kind of formal document appropriate to which type of contract is a charter party which may or may not be followed by a bill of lading.” The present contract is clearly one of the bill of lading type and under Article III., rule 3, the shipping company (apart from the effect of Article VI.) would be bound to issue a bill of lading after receiving the goods into his charge on demand of the shipper.

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So far as concerns the “carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland” the operation of Article VI. is materially altered, and this Article applies, and only applies, if, as was done in the present case, the “terms agreed” are “embodied in a receipt which shall be a non-negotiable document and shall be marked as such.” It would appear to me that unless I am precluded by a binding authority from so doing, I ought to hold that in the present case this receipt was given under the express terms of Article VI. and that the defendants as shipowners were only entitled to agree with the plaintiffs, as shippers, as to their responsibility and liability for the goods shipped if this agreement was carried out in accordance with Article VI. as modified by section 4—and it is to be observed that this is what purports to have been done. If this is so, “this stipulation,” which in the Article must be equivalent, I think, to the agreement as to terms, must not be “contrary to public policy or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care or discharge of the goods carried by sea.” Mr. Fox relies on the case of *Harland & Wolff Ltd. v. Burns & Laird Lines Ltd.* (1), as an authority for his contention that the Act of 1924 has no application to the contract of carriage in the present case and that the defendants were entitled to prescribe any terms as those on which alone they would accept goods for

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carriage. The case is undoubtedly one of the greatest importance, and I have given anxious consideration to the judgments delivered by the members of the First Division of the Court of Session.

It will be observed that in *Harland & Wolff's case* (1), no bill of lading was issued or (as appears from the judgments) contemplated, and that it was after the loss of the ship and cargo that the cargo consigned by the plaintiffs was detailed by the shipowner in a letter acknowledging its receipt and despatch, which acknowledgment bore the words "Received, carried and held subject to terms of quotation and conditions of carriage specified in our sailing bills." As said by Lord President Clyde: "the contract of affreightment in the present case was a highly special one." It was not only not actually "covered" by a bill of lading, but a bill of lading as that document is known and used in the custom of merchants was alien to "its purpose."

The distinction is clear between that case and the present, in which the bale was carried on "terms agreed," "embodied in a receipt which shall be a non-negotiable document and shall be marked as such." The Court of Session in the absence of any bill of lading or similar receipt held that the Act of 1924 had no application to the case before them. It is not for me to criticize the judgments of the learned Lords of Session, which I approach with the utmost respect, but I say that in my clear opinion that case is not an authority on the facts of the present case.

I have not found and the industry of counsel has not furnished me with any other relevant reported authority, and accordingly I hold that, having regard to the terms of the receipt in this case, I must consider whether or not the conditions sought to be imposed "are not contrary to public policy or the care or diligence of his (the shipowner's) servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea."

(1) [1931] S.C. 722.

In the absence of all authority I have come to the conclusion that these remarkable conditions of carriage, which purport to relieve the defendants from all liability, and to deprive the shipper of every shred of right, are "contrary to public policy," having special regard to the restrictions on the exemption of liability which in certain cases it was clearly the object of the Act of 1924 to introduce. I should be also prepared to hold that, as no explanation whatsoever has been given by the defendants as to the loss of the plaintiffs' goods, the reasoning in *Curran v. Mid. G. W. Rly* (1), even when that case is read in the light of the speeches in *Smith v. G. W. Rly* (2) (in which *Curran's case* was distinguished), would enable me to hold that these conditions are in the circumstances of the present case "contrary to the care or diligence of his (the ship-owner's) servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea," and that this bale has been lost owing to the failure of some servant or agent of the defendants to exercise the care or diligence required in the carriage of the plaintiffs' goods.

Therefore on the ground that the Act of 1924 *does* apply to the present case, I reverse the decision and give a decree with costs.

I need only observe that the learned Recorder was never invited to consider the application of the Act of 1924 to the present case and, as I have said, if I had not come to the conclusion that this Act *did* apply, I should have affirmed the decision without hesitation.

Solicitors for the plaintiffs: *Geo. Allen & Co.*

Solicitors for the defendants: *McKinty & Wright.*

M.W.G.

(1) [1896] 2 I.R. 183.

(2) [1922] 1 A.C. 178.

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Feb. 4.

Tramway—Passenger about to dismount from tramcar—Leaving seat and standing on platform while car in motion—Fall caused by sudden acceleration of car—Negligence—Right to a new trial.

The plaintiff was a passenger on a tramcar of the defendants. He twice told the conductor that he wished to dismount at L. Avenue and on each occasion the conductor said "all right"; all trams stopped at L. Avenue on request of passengers. As the tramcar was approaching L. Avenue the plaintiff left his seat and was standing on the platform at the back of the car which was travelling slowly, when there was a sudden acceleration and a shock which threw him off the car. In an action by the plaintiff for damages for negligence, counsel for the defendants, after the evidence for the plaintiff as to liability had been concluded, submitted that he had no case to answer as there was no evidence of negligence; he stated that he did not propose to call any evidence. The trial judge so held and entered judgment for the defendants. By consent of the parties damages were assessed at £800.

Held by the Court of Appeal, that there was evidence of negligence on the part of the defendants, that the defendants were not entitled to a new trial of the action, and that the plaintiff was entitled to judgment for £800.

APPEAL by the plaintiff against a decision of Brown, J.

The facts are stated in the judgment of Babington, L.J.

Fox, K.C., and Agnew, for the appellant.

Chambers, K.C., and Sheil for the respondents.

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L.J.

BABINGTON, L.J.: The plaintiff Samuel Anderson received injuries by falling from a tramcar and alleges that his fall was caused by the negligence of the conductor and driver, both servants of the defendants.

The facts as sworn to by the plaintiff were not contradicted. On the morning of the accident, 12th December, 1941, he boarded a Ballygomartin tram at the County Down Railway Station, the time being about 8-15 a.m. and ascended to the upper compart-

ment. His destination was a request stop at Lawnbrook Avenue near to which he was employed. After the tram had started the conductor came up to the plaintiff and had a conversation with him as to where the tram stopped, and the plaintiff said he was going to Lawnbrook Avenue. The conductor replied "Sit down, that will be all right." There were no other passengers downstairs and only one other on the top of the tram. Later on, the conductor took the plaintiff's fare, and they had a further discussion as to where the tram was going—the plaintiff again telling the conductor that his stopping place was Lawnbrook Avenue, to which the conductor replied "That will be all right." Approaching Lawnbrook Avenue the plaintiff left his seat, went on to the rear platform preparatory to alighting and stood there holding on to the right hand side rail by the window. Twenty yards from the Lawnbrook Avenue stop the tramcar was going slow, and the plaintiff then saw the conductor at the far end of the downstairs compartment talking to the driver. He said there was no signal given to stop the tram and that while he was standing waiting to alight he saw the driver make a quick motion with his controls whereupon there was a sudden acceleration of the tramcar and a great shock, which threw him on to the road.

The tramcar did not stop at Lawnbrook Avenue, and the plaintiff was left lying on the road until some passers-by rendered him assistance.

The plaintiff was cross-examined as to his description of the motions performed by the driver, and it was suggested that what he saw must have been an application of the brake and not of the electric power, but as the driver was not called this cross-examination was inconclusive to displace the plaintiff's evidence as to the failure to stop the tramcar and its sudden and unexpected acceleration which could not have been caused by an application of the brake.

On this evidence counsel for the Corporation asked for a direction which Brown J. granted, saying "I came to the conclusion that the plaintiff had not given any evidence of negligence on the part of the defendants

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contributing to the accident. The "jolt" was unexplained. The plaintiff's description of what the driver did was a description of putting the brake on."

The learned Judge nowhere suggested that the plaintiff was an unsatisfactory witness or that he did not believe him, and the case therefore turns on the inference to be drawn from his uncontradicted evidence. It was urged in argument before us that the Judge decided the case on the narrow ground that the plaintiff's statement as to the motions of the driver could not be correct and that this disposes of the case.

If Brown J. did so decide, he misdirected himself and drew an unwarranted inference from the evidence, but I am satisfied that this was not the entire ground of his decision. The case was made before him that it is an absolute rule of law that a person who leaves his seat before a tramcar stops does so at his own risk and cannot recover in respect of injuries received when alighting, and I think the learned Judge must have been influenced by the authorities cited to him which are said to establish this proposition.

These authorities were opened to us but I will not examine them again in detail for I am satisfied that there is no inflexible rule that passengers must not leave their seats until the tramcar stops.

The cases which are said to establish this are unsatisfactory and most of them appear to be decisions on particular facts and are qualified by the absence of a request of the passenger to have the tramcar stopped, the cause and nature of the "jolt," and other elements which distinguish them from the present case.

There are passages, however, in some of these cases which suggest that some such principle was recognised both in our courts and in England but it was expressly dissented from in *Hall v. The London Tramways Company Ltd.* (1) in England, and I prefer to follow that decision for the reasons there given rather than the Irish cases which are far from being conclusive. Counsel on both sides appealed to our own experience and if I am justified in referring to matters not to be found in the Judge's notes but which have often been debated

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in our courts and are of everyday experience, I would say that it is a common practice for passengers to rise from their seats when approaching tram stops in order to be ready to alight with dispatch when the car pulls up. If this were not so, it would be impossible to operate tramcars especially in what are called "rush hours," for then either the whole tramway system would be held up or passengers, especially those on the upper deck, would find it impossible to alight. In the performance of this everyday act the plaintiff was therefore not guilty of negligence. Preparatory to alighting, passengers who go on the platform while the tramcar is in motion take the risk of the ordinary and predictable acts of those in charge and the resulting behaviour of the tramcar, including such jolts as are usual and to be expected, but if while so on the platform and taking reasonable care for their own safety they are injured as a result of some negligent act on the part of the tramway authority's servants, they are entitled to rely on such act as a cause of action and to say that it constituted an added risk over and above those which they could reasonably be expected to guard against.

In the present case the plaintiff had given the conductor notice of his stopping place and the conductor had intimated that it would be "all right."

Acting upon this assurance the plaintiff placed himself in a position to alight. The tramcar was going slowly approaching the stop when suddenly and without warning there was a violent acceleration and the plaintiff was precipitated on to the road. The tramcar did not stop, as the plaintiff had every reason to expect, but accelerated, which he could not have foreseen, and as the conductor was not called it is impossible to say whether he knew that the plaintiff had fallen off and elected not to stop or was unaware of this fact having forgotten all about him.

It is sufficient to say that the plaintiff has made a *prima facie* case of negligence against the conductor, or the conductor and driver combined, in that the conductor having undertaken to stop the tramcar at Lawnbrook Avenue, and while the plaintiff was lawfully getting ready to alight, caused or permitted the

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driver to accelerate thereby placing the plaintiff in jeopardy without notice or warning.

It was urged upon us that this Court should not disturb the findings of fact of the trial judge, but as the defendants elected not to call any evidence and the learned Judge has not said that he disbelieved the plaintiff, the evidence is all one way, and the only question for us is as to what inferences should have been drawn from it, and upon this issue the plaintiff has made out a clear case of negligence which required an answer, and that answer was not forthcoming. The learned Judge therefore misdirected himself when he ruled at the close of the plaintiff's case that the defendants had no case to meet.

Counsel for the defendants argued that the plaintiff was guilty of contributory negligence, but there was no evidence to support this beyond his presence on the platform while the tramcar was in motion. When the acceleration occurred which caused the jolt as a result of which he lost his balance, he had no chance of avoiding the fall and it was not suggested that he was standing in any unusual place or that he was not holding on to the rail with sufficient firmness to render him secure against such jolts as might have been expected.

The learned Judge having acceded to the application of the defendant's counsel for a direction, assessed the damages at £800 which makes it unnecessary for the Court to send the case back for a new trial.

Mr. Chambers asked to have the case sent back for a retrial, maintaining that it has been the practice in our courts to grant directions without requiring counsel to say whether he intends to call evidence or to stand on his application for a direction. I am not aware of any such practice in cases like the present in which the application was based on insufficiency or absence of evidence to render the defendants liable, and if this has been the practice it is in my opinion wrong, and the defendants having asked for a direction must be taken to have elected to stand on it, and having failed cannot be allowed a second chance.

Moreover Mr. Chambers appears to have told the Judge that he intended to stand on his application so

that this door is closed against him whatever view be taken of the trial.

The learned Judge misdirected himself when he held that there was no evidence upon which the defendants could be made liable and accordingly his judgment dismissing the action must be reversed and judgment entered for the plaintiff for £800 together with the costs of the trial and of this appeal.

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MURPHY, L.J.: I agree. Having regard to the frequent references by Mr. Chambers to the "findings of a Jury," I must point out that this action was tried by a Judge without a Jury and I refer to the rules which should be applied by this Court on the hearing of such an appeal, as clearly stated by Lindley M.R. in *Coghlan v. Cumberland* (1), see also *Cooper v. General Accident Assurance Corporation* (2) Andrews L.J. at p. 56. I need not refer in detail to the plaintiff's evidence. On two separate occasions the plaintiff stated his destination to the tram conductor, and the conductor said "That would be all right": i.e., that the tram would take him to and halt at that destination. In his description of the accident the plaintiff made it clear that his fall was caused by a sudden increase in the speed of the tram, which as it approached the "Request Stop" at Lawnbrook Avenue had been going slowly. In cross-examination Mr. Chambers apparently suggested that the description given by the plaintiff of the action of the motor-man ("driver") was a description of an application of the brake. If the Trial Judge so found I differ from him: the credibility of the plaintiff was not impugned and his evidence was uncontradicted, a finding that the brake had been applied would be unsupported by evidence and against the entire evidence.

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I also hold that—unless the Trial Judge disbelieved the plaintiff's uncontradicted evidence—and he has not said that he did disbelieve it—the "jolt" was *not* unexplained.

To assert, as Mr. Chambers has done, that, because the plaintiff said that he "saw the driver turn on

(1) [1898] 1 Ch. 704.

(2) [1922] 2 I.R. 38.

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power with his right hand ” and illustrated this by turning his right hand clockwise, this must be a description of a movement of the brake lever, is a proposition which, if I am entitled to use my own experience, I unhesitatingly reject.

A “jerk ” or “jolt ” occurred (this was not disputed before us), it was a jerk forward (this, again, was not disputed), the tram did not stop at the Lawnbrook Avenue Request Stop (the plaintiff said this, and a strongly corroborative fact is that it was not suggested that either the conductor or the motor-man had come to speak to or assist the plaintiff after the accident), and every circumstance goes to show that there was not an application of the brake, but an increase of speed caused by a movement of the power lever to the right, i.e., clockwise.

No evidence having been given on behalf of the defendants, an explanation of this increase of speed must be based on speculation : if it were material to search for an explanation the conductor’s statement to the plaintiff that “ he wanted to go across and get in front of Malone Road car,” and the fact that prior to the increase of speed the conductor was seen by the plaintiff “ up at the front of car with door partly open and he was speaking through to driver ” would probably be material.

Having regard to the questions put to the plaintiff in the first part of his cross-examination and the authorities cited at the close of the plaintiff’s case, it is clear to my mind that at the trial Mr. Chambers relied on the submission that because the plaintiff had descended to and was standing on the platform when the tram was in motion he was the “ author of his own misfortune.” Such a proposition would be supported by passages in the judgments in *Baird v. South London Tramways Co.* (1), and *Folkes v. North London Rly. Co.* (2), as well as by passages in the judgments in *Roscoe v. Dublin United Tramways Co.* (3); *Martin v. Dublin United Tramways Co.* (4), and *Murphy v. Dublin United Tramways Co.* (5). *Baird’s* case (1) and *Folkes’*

(1) 2 T.L.R. 756.

(2) 8 T.L.R. 269.

(3) [1909] 2 I.R. 15.

(4) [1909] 2 I.R. 13.

(5) 43 I.L.T.R. 11.

case (1) in so far as they support the proposition that a passenger who gets up from his seat in a moving tram or train and goes to the platform or compartment door is as a matter of law guilty of negligence, have been overruled or dissented from in *Hall v. London Tramways Co.* (2), and I desire to express my respectful concurrence with the judgment of Lord Esher in that case.

As to the passages in the Irish cases, I dissent from the proposition that a passenger who stands up in a moving tram when approaching the stop at which he proposes to alight and walks on to the rear platform does so at his own risk, and, if any of these cases are authorities for such a proposition, I must respectfully decline to follow them. It should be pointed out, however, that before one can appreciate the judgments in these cases it would be necessary to know the facts fully and accurately and in the Reports the evidence is necessarily summarized. A passenger who goes on to the platform of a moving tram must accept, in my opinion, the risks ordinarily incident to travel in such a position, e.g., a swerve or sway of the tram caused by a curve in the track or a "jolt" over points—and must take reasonable precautions, such as holding on to the bars or rails provided, to protect himself against such ordinary risks, but if something out of the ordinary is done in connection with the management of the tram and this amounts to negligence on the part of the conductor or motor-man, the passenger, although standing on the platform, does not accept the consequences of this negligence.

In the present case there is no suggestion of a curve in the track at this point or of points over which the tram could have jolted (the map produced would have negatived either suggestion), and there is, in my opinion, clear evidence of negligence on the part of the conductor who should have taken steps to stop the tram at this Lawnbrook Avenue stop so that the plaintiff might have alighted, and if he had occasion to go to the motor-man's end of the tram should have directed the motor-man to stop the tram at this "stop." I am also of opinion that there was evidence of negligence

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(1) 8 T.L.R. 269.

(2) 12 T.L.R. 611.

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on the part of the motor-man in suddenly turning on the power and causing the tram to accelerate when the plaintiff was on the platform intending to get off at this stop. The accident was caused by the negligence of the servants of the defendants.

From the notes it appears that the application of Mr. Chambers at the close of the plaintiff's case was based on the ground that there was "no evidence of negligence." An argument that the plaintiff was on the platform at his own risk would naturally suggest that the plaintiff was guilty of contributory negligence, but, as I have clearly indicated, I can see no evidence of contributory negligence on the part of the plaintiff who appears to have acted in a reasonable and careful fashion.

It is agreed between counsel that when Mr. Chambers made his application, the learned Judge (having regard to the practice so clearly stated by the Master of the Rolls, Lord Greene, in *Laurie v. Raglan Building Co.* (1) at p. 155) asked him if he proposed to call evidence and that Mr. Chambers said that he did not propose to do so. The Judge, by agreement, fixed the damages at £800, and although before us Mr. Chambers submitted that on the question of contributory negligence the case should be sent to a new trial, I agree that we must deal with the case on the evidence as it stands and that the plaintiff is entitled to judgment for £800.

I should add that our view of the law is not merely in accordance with Lord Esher's judgment above referred to, but also with the judgments of the Court of Session in *Watt v. Glasgow Corporation* (2) to which Mr. Fox referred us.

MEGAW, J.

MEGAW, J. : I entirely agree with the judgments just delivered and the only observations I desire to add are with reference to Mr. Chambers' contention that the Irish practice as to counsel's asking for a direction at the close of plaintiff's case differs from the English as stated by the English Master of the Rolls in *Laurie v. Raglan Building Company* (1), and that under the Irish

(1) [1942] 1 K.B. 152.

(2) [1919] S.C. 300.

practice he would still be entitled to call evidence as to facts.

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In my opinion there is no difference in the Irish practice from that followed in the English courts.

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ATION.

I should like also respectfully to say that in my opinion the judgment of Lord Esher in *Hall's Case* (1) is a true guide to the principles which should govern decisions in cases like the present.

MEGAW, J.

Solicitors for the appellant : *J. C. W. Rea & Son.*

Solicitor for the respondents : *Town Solicitor.*

J. McC.

(1) 12 T.L.R. 611.

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IN RE FERGUSON'S PATENT (No. 2).

June 15, 16,
17, 18, 23.

Patent—Extension—Adequacy of remuneration—Loss by reason of war conditions—Difficulty under war conditions of proving amount of loss—Patent and Designs Act, 1907 (7 Edw. 7, c. 29) sec. 18 : Patent and Designs Act, 1919 (9 & 10 Geo. v., c. 80) sec. 7 : Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2 & 3 Geo. 6, c. 107) sec. 6.

A petitioner applied for the extension of a patent granted to him for an "apparatus for coupling agricultural implements to tractors and automatically regulating the depth of work." Prior to the grant of the patent the petitioner had for many years experimented on improvements in tractor ploughs and had made continuous improvements in the construction of them. The application was opposed on the ground, *inter alia*, that the petitioner had been sufficiently remunerated for his ingenuity, labour and expenses. From the time of the grant of the patent the petitioner had devoted his whole time to such experiments, and to finding a market for the apparatus and to having it brought into use. In the United Kingdom he had little success in getting the apparatus manufactured and brought into use, but immediately before the outbreak of war in 1939 he was in negotiation with a large company which was ready to manufacture tractors under the patent; when the war broke out the Government refused to sanction the provision of the necessary materials, and in consequence the petitioner suffered some loss. In 1939 the petitioner went to the United States of America where he held patents corresponding to those held by him in the United Kingdom. In 1939 he acquired a controlling interest in the share capital of a Corporation in the United States to which he granted an exclusive licence to manufacture, or cause to be manufactured, in the Western Hemisphere all machinery for mechanised farming covered by his patents in the United States or any other country, in consideration of certain royalties and a share of the profits to be paid to him. The shares in this Corporation were unsaleable in the market, and owing to war conditions and the demands of Government it was practically impossible for the petitioner or anyone else to prove the value of them. The apparatus was of great utility and merit, and the petitioner had done his utmost to procure its use.

Held, that the petitioner was entitled to an order extending the patent for the further term of two years.

The facts appear in the judgment.

Warnock, K.C., and *Belford* for the petitioner.

Porter, K.C., Chambers, K.C. and McVeigh for objectors.

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Patton for the Comptroller General of Patents.

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MEGAW, J. : The Petition is concerned with a Patent granted in February, 1925, dealing with apparatus for coupling agricultural implements to tractors and automatically regulating the depth of work, known as No. 253566 and referred to throughout the arguments as 66. The implements which were in fact in consideration were ploughs. This Patent was granted to Henry George Ferguson of Belfast, and by a subsequent instrument Henry Ferguson Motors Ltd. became entitled to some interest in the Patent and I treat them jointly as Petitioners. The Patent normally came to an end on 11th February, 1941, and on 12th February, 1941, an application was submitted to the Registrar of the High Court to receive a Petition for the extension of the Patent. He declined to receive it as the Patent had expired and the time for lodging the Petition prescribed by the Statutes had also expired and indeed the preliminary formalities to presenting the Petition had been neglected. A few days afterwards an application was made to me *ex parte* that the Registrar should receive the Petition. I required the petitioners to give notice to the Ministry of Commerce and to the Comptroller. On 25th February another *ex parte* application was made for the same purpose when I made an order that H. G. Ferguson be at liberty to issue an originating notice of motion for service out of the jurisdiction for Monday, 24th March, addressed to the Comptroller General of Patents and to the Solicitor to the Board of Trade. On 24th March I made an order that applicant should be at liberty to present his petition without prejudice to the question whether the Court had jurisdiction to entertain the application—the applicant undertaking to insert advertisements required by the rules forthwith. On 22nd October after some adjournments application was made in regard to the hearing of the Petition. The Comptroller was represented on that day and made

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objections to my entertaining the petition—and I, being of opinion that the Court had no jurisdiction, dismissed the Petition with costs to the Comptroller. In re *Ferguson's Patent* (1). It was stated at this hearing that by the Patents and Designs (Emergency) Act of 1939 an extension of time could be sanctioned by the Comptroller for doing any act limited by the Patents and Designs Act under sec. 6 of the Patents Designs (Emergency) Act, 1939—and that the Comptroller was willing to grant such sanction for an application by the petitioner for extension of time. I was asked to hear the petition then as the extension had been agreed to. I ruled that this could not operate retrospectively.

The present Petition was afterwards presented on 20th January, 1942, and on 9th March an application was made to fix a date for the hearing. Mr. Patton for the Comptroller contended that the Court had no jurisdiction to entertain the petition, on the ground that though the Comptroller had agreed to extend the time, this did not apply to a second Petition. I decided that in the circumstances I had jurisdiction.

After these preliminaries, and some interim applications, the petition came to be heard on 15th June. It is brought under sec. 18 of the Patents and Designs Act, 1907, and seeks that the term of the Patent should be extended for a further term of 10 years. On 27th May, 1942, the Comptroller has given notice of objection to the granting of the prayer on four grounds. These grounds were:—

1. The said invention is not of sufficient merit, utility or benefit to the public and does not afford sufficient consideration to justify the extension sought or any extension of the term of the letters patent therefor ;
2. The Petitioners and each of them have been sufficiently remunerated and rewarded for all their respective expenses, labour and ingenuity respecting the said invention ;
3. The petitioners and each of them have not sufficiently and properly endeavoured to procure

(1) [1942] 1 N.I. 130.

the early and progressive use of the said invention within this realm ;

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4. The accounts lodged with the said Petition are insufficient

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(a) to show the expense and income respectively attributable to the said invention ;

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(b) to show the amount of

(1) remuneration and

(2) profits accruing to the Petitioners and each of them from the said invention.

On 28th March, David Brown Tractors Ltd. of Huddersfield lodged grounds of objection. These grounds were :—

1. The Petitioner has been adequately remunerated and rewarded for all his ingenuity, labour and expenses respecting the said invention and letters patent ;
2. If the Petitioner has failed to obtain a sufficient remuneration or reward he has only failed to do so in consequence of his own negligence and default ;
3. The alleged invention is not of so much public utility as to be a sufficient consideration for any extension of the term granted by the said letters patent ;
4. The Petitioner does not possess sufficient merit to entitle him to an extension of the term granted by the said letters patent ;
5. The Petitioner has not made a proper or sufficient disclosure of the income, receipts, profits, expenditure and dealings in respect of the said invention and letters patent ;
6. The accounts set out in the Petition are inaccurate and misleading ;
7. The above-mentioned Company does not admit any of the averments contained in paragraph 13 of the Petition ;
8. The said invention has been and still is mainly or exclusively manufactured abroad ;
9. For some years past the above-mentioned Company as licensee of the Petitioner has devoted

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considerable time and attention and expended large sums of money in the equipment of premises and the provision of the necessary plant and machinery for manufacturing the tractors and implements the subject of the said invention and letters patent, and if this Honourable Court should think fit to grant an extension of the term of the said letters patent, the Company will submit that suitable provision should be made for the protection of its interest in the manufacture of the said tractors and implements.

Section 18, sub-section 4 of the Patents and Designs Acts, 1907 and 1919, provides that the Court in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

Sub-section 5 provides that if it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding five, or, in exceptional cases, ten years, or may order the grant of a new patent for such terms as may be specified in the order and containing any restriction, conditions, and provisions the Court may think fit.

At the outset I may draw attention to the fact that since the outbreak of war the Legislature has given the Comptroller of Patents some rather drastic powers in modifying the administration of the laws governing Patents. The last Act of Parliament indeed has been passed since the presentation of the Petition before me. These powers seem to me for the most part tending to relief of patentees. Apart from this war-time legislation the Petition could not be entertained at all. I certainly have found the Comptroller's appearance and assistance of the greatest value, holding as he has done a praiseworthy conception of his duty to the public and the patentee, and I have had the advantage of his wonderful knowledge of the many decisions given on the Patent Acts. His assistance has been directed to the substance of the matters involved as distinct from minor informalities arising from the many con-

fused matters that complicated the case. Clearly his desire was to see justice done to the patentees in accordance with the spirit of the Patent Laws and to use the new powers granted to him by recent legislation with a due regard to the interests of the public.

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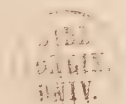
I may say that throughout my consideration of the petition I have borne in mind Saxby's case (1) and the very helpful observations made by Lord Parker—then Parker J.—in *Johnston's Patent* (2). The latter was the first case reported under the Patents Act, 1907, under which the jurisdiction of the Privy Council was transferred to a Chancery judge.

The Petition sets out the nature of the invention and relates how the inventor, Henry G. Ferguson, had for many years been experimenting on improvements on the tractor plough and accompanying implements and mentions patents taken out by him prior to the patent 66 for several inventions making continuous advances in tractor plough construction. It then describes the chief features of this patent and particularly its advantages in regulating depth control by a power device. The petition further states that from the grant of the Patent Mr. Ferguson kept on working for commercialisation of the invention and devoting his whole time to this and to experimenting on improvements to make it more useful, and altogether there are some 9 further patented adaptations to the plough as now in the market ranging from 1928 to 1939.

Throughout the time from the grant of the patent Mr. Ferguson with his technical assistants endeavoured unremittingly to have the plough brought into commercial use, and took out some foreign patents. He endeavoured to have the manufacture of the tractor as patented taken up by some English firms of repute, and also tried to have this done in United States. In 1937 he made an agreement with Ferguson Brown Ltd. for a licence to make use and vend the invention for a period of five years—an agreement which was afterwards modified. A number of tractors were made by them under this licence but these arrangements resulted

(1) L.R. 3 P.C. 292; 7 Moo. P.C. (N.S.), 82.

(2) [1909] 1 Ch. 114.



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in nothing fruitful. Meanwhile Mr. Ferguson got into touch with Messrs. Ford Motor Co. of Dagenham and they appear to have been ready to manufacture tractors under this Patent when war broke out and the necessary Government sanction to the provision of material necessary for manufacture was withheld. Para. 13 of the Petition deals with this, and the consideration of these circumstances is very relevant to the present application and falls under the statutory words "circumstance of the case," which cannot now be properly considered without giving weight to war conditions existing or likely to arise. Clearly Mr. Ferguson had come into close contact with Mr. Henry Ford when the Dagenham negotiations took place, as immediately after this their American relationship in regard to tractor manufacture gave a different aspect to the fortunes of the Tractor plough under these patents.

Mr. Ferguson has been in the United States of America since 1939 with the exception of a few weeks in the United Kingdom in 1940, and this has handicapped him in his business affairs here. He has taken out corresponding patents to those in the United Kingdom, in the United States. In June, 1939, he acquired a controlling interest in a Corporation in the United States known as the Ferguson Sherman Manufacturing Corporation to which Corporation he granted an exclusive licence to manufacture or cause to be manufactured in the Western Hemisphere only, all machinery for mechanised farming covered by his patents whether in the United States or any other country, and Mr. Ferguson had issued to him share capital in the Corporation amounting to 225,000 dollars and three per cent. royalty on net sales of implements (not on tractor) with a royalty not exceeding five million dollars and a maximum dividend of 20 per cent. on net profits. In fact the manufacture of the implements under the Patents has been carried through by Henry Ford. These transactions mark a change in the outlook and returns of the enterprise of Mr. Ferguson to which I have already referred, and must refer again when I consider the question of adequate remuneration.

The utility of the Patent has been recognised in such a way that this became indisputable. It is absolutely clear that in the United Kingdom there was a distinct loss by the Petitioners on the exploitation of the patents and it is not contended that up to 1939 Mr. Ferguson was at all adequately remunerated, and indeed I should think that, had it not been for the subsequent history of the invention, the utility of the Patent itself would have been contested. I regard the Patent as one of exceptional merit especially at the present time when it is common knowledge that the Allied Governments have been taking such strong measures to increase cultivation and the fact that the ploughs incorporating the patent are supplied under the Lease and Lend Agreement. These ploughs are clearly of great utility in our own country where the surface of the soil is so hilly, and as a rule the fields are small, and where even in small fields the depth and character of the soil is so varied. I have no doubt that the value of the invention to the public largely exceeds any benefit derived from it by the patentee.

Therefore I find as a fact that the invention protected by the Patent is of exceptional merit so far as the public is concerned.

I am also satisfied that the Petitioners have spared no endeavour to bring the invention into use and to engage public interest in its advantages, as well as various manufacturing firms of agricultural implements. I should infer from the evidence of Mr. Thompson, a Director of the Petitioning Company, that in all probability success in having the plough incorporating this patent manufactured in Dagenham would have been achieved except for the war. I may interject that I was greatly impressed by the evidence given by Mr. Thompson. He seemed to me to be an absolutely candid and truthful witness and a man of very high intelligence with a most unusual recollection of affairs in most complicated matters lasting for so many years. To a great extent his evidence compensated for the absence of Mr. Ferguson himself, which I regret was not forthcoming, and which in one part of the case was of very great importance.

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One point raised by Mr. Patton for the Comptroller was to direct my attention as to whether the Petitioners had done their best to get remuneration for war extension as distinct from ordinary extension. As to this I conclude that Mr. Ferguson has been by no means inactive, and that his long stay in the United States has been largely influenced by this. He has also directed my attention as to whether Mr. Ferguson has suffered loss by reason of the war. I am clearly of opinion as I have already indicated, that the Dagenham breakdown did cause some loss in the home exploitation, but that such loss has been more than countered by the American ventures.

I now come to the real crux of the case, and this is a matter of very great difficulty—whether the Petitioners have not been adequately remunerated by this patent. The onus of showing this is on the Petitioners. It is clearly a condition of any application of this section of the Patents Act that it should be shown to the Court that they had been inadequately remunerated. In considering this, profits on corresponding foreign patents as well as on the English patents must be taken into account, and the likelihood of future profits must also have weight given to it. Accounts have been furnished. Those first furnished were incorporated accounts affecting all the patents the property of Petitioners employed in the manufacture of the plough. The Comptroller of Patents then asked for segregation of the accounts connected with the Patent under consideration. The original accounts furnished were in my opinion bona-fide well-kept accounts and were those kept in the ordinary books of the Petitioners dealing with all the patents. Revised accounts attempting segregation have been furnished. The Comptroller has investigated them and is satisfied with their accuracy. Segregation as regards profit and loss and expenditure attributable to any particular patent could only be a matter of approximation. It is one of the features of the present case, that the various patents are so inter-dependent for their value that nothing in the way of absolute accuracy would be possible, but the Accoun-

tants for the Petitioners, after consultation with the experts concerned with the Patents, have sent in revised accounts in detail, dealing separately with the United Kingdom and the United States. They have estimated that 28 per cent. of the receipts from the machinery in the United Kingdom is property in relation to the patents in suit, and 25 per cent. is the corresponding figure for the United States receipts, the difference being based on the fact that there were 9 of Ferguson's patents used in America and 8 in this country. There was some controversy in the hearing as to this apportionment. The Comptroller was satisfied, and I have come to the conclusion that in arriving at a decision I should act on that basis.

When this has been accepted by me, I have the material before me to determine the amounts actually received by the Petitioners in respect of the Patent which bear out the statement I have already made that at the date of expiry of the British Patent there was a considerable loss to be recorded. The principles of law applicable, however, require consideration to be given to profits derived from the invention from Foreign Patents. Though there have been some foreign patents taken out other than those in the United States, there does not seem to have been any profit from them, but during the last two years before the expiry of the patent the profits from the United States patents have been very considerable.

There has been some criticism, not entirely undeserved, as to the disclosure in evidence of the position of Mr. Ferguson in the Ferguson Sherman Corporation, and the absence of evidence as to the value of the shares of Mr. Ferguson in that Corporation of which he seems to be practically the owner, and I have been asked to dismiss the petition because of this. I may say that I do not think that there has been any *mala fides* on his part, and I can realise how in the present situation when such terribly confused conditions prevail, it would have been almost impossible to give any authentic evidence as to the value of Ferguson's holdings in the Corporation. It is disclosed in the petition that Mr. Ferguson was owner of three-fourths of the issued share capital

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amounting to 225,000 dollars, and the court has had evidence that he had acquired the other fourth and was in full control of the Corporation. This Corporation absolutely is dependent on Mr. Henry Ford, as he is the manufacturer who supplies it with the implements, and under the war conditions now prevalent in America any attempt at giving a figure would be merely speculative.

Mr. Porter contended that the petition should be dismissed on the grounds that *uberrima fides* had not been present as regards the matters set out in the petition and the inadequacy of the accounts. If the petitioners had been required to bring before the court the details insisted on by Mr. Porter I shudder to think how long the court would have been occupied and the amount of stationery necessary would have been appalling. On the whole I am of opinion that sufficient detail has been given of relevant matters. I am satisfied that there has been no *mala fide* suppression. By an oversight, I think, some relevant matters were omitted in the affidavit of discovery, but his clients had certainly an opportunity of investigating this during the hearing, and in fact did so.

On the value of the shares in the Ferguson Sherman Corporation and the arrangements between that Corporation and the Ford Company, the court would have welcomed more assistance from Mr. Ferguson; and while I do not think it right to dismiss the petition on the ground that fuller evidence was not given I must take this into consideration as against the petitioners on any doubtful matter. I cannot close my eyes to the fact that war conditions and the demands of Government both here and in the United States would make it practically impossible for Mr. Ferguson or any one else to give convincing evidence as to the realities of such values as those of shares in such a Corporation. We have some paper values but those do not take one very far; the shares are unsaleable in the market. In fact the scrip is now in the hands of the British Government. The Ford Company itself has had to give up, for the time at any rate, its tractor manufacture. Rubber for the tractors may not be forthcoming, and the whole undertakings are in a state of flux.

Coming to the amounts of profits actually received by the petitioners, I am inclined on the figures before me to come to the conclusion that the profits of the American patents and the losses on the English have practically cancelled each other at the date of the expiration of the patent in February, 1941. In the next year some £8,000 of profits have been paid, and these have been growing at an increased rate since that date. Apart from the value of Mr. Ferguson's holding in the Ferguson Sherman Corporation, I would have no hesitation in saying that this was not anything like adequate remuneration for the patent. At the moment the prospects of profits are good, but taking everything into account I should not think that the value of such prospects, added to the amounts received, would be adequate remuneration. The capital of the Ford Sherman Corporation, as I have said, is not easily valued. One must take into consideration that its value entirely depends on the attitude of Henry Ford to it. No doubt there is a reserve account shown by the books which should be available for Mr. Ferguson on a break-up. The Corporation undertaking is concerned with distribution, not manufacture. There is nothing but a verbal agreement between it and Mr. Ford regarding their business relations. A more speculative state of affairs in mercantile activities could hardly be conceived, and while I consider that the proportion of the value of Mr. Ferguson's holdings in the Corporation attributable to this patent at present is undoubtedly very considerable, on the whole, I conclude that the petitioners have been inadequately remunerated by this patent for such a valuable invention and that some extension should be granted. I have already mentioned that I have not received the assistance from Mr. Ferguson which I might have expected on the value of these shares, or of the verbal arrangement with Mr. Ford, but I have come to the conclusion that I should not, in present circumstances and the difficulties that surround the carrying on of ordinary mercantile transactions at present, dismiss the petition; but I will limit very considerably the extension which might have been given had further information been available. It is

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only just that the petitioners should be adequately remunerated, and my duty is, I think, to see that this is effected within the law and with due regard to the public and others interested, taking into consideration all the circumstances of the case which, as I have said, necessarily include the relevant effects actual and potential of war conditions.

I grant the extension with less hesitation, as it will not in any way act detrimentally to the public. It would be impossible at the present time for any other person to get the facilities or the material for putting agricultural implements embodying this valuable invention on the market, and I recognise the great work and wonderful ingenuity and perseverance of Mr. Ferguson on his development of the tractor plough and his discovery embodied in this patent. In his efforts he had to contend with many disappointments.

The only matter remaining is what length of time the patent should be extended. Mr. Patton has, on behalf of the Comptroller General, asked me to deal with the matter on the basis of dealing with any war loss. I take this into consideration, and am of opinion that the grant of an extension of the patent for two years will adequately remunerate the patentees and will compensate them for any loss, owing to the war, incurred.

It has been agreed that the patent itself should be confined by excluding from the operation of the power unit the factors relating to the electric motor and mechanical unit. These have not been used—the hydraulic pressure motor having been that which is embodied in all the implements manufactured.

Solicitor for the petitioner : *W. K. Gibson.*

Solicitors for the objectors.: *Porter Morris & Co.*

Solicitor for the Comptroller General of Patents :
J. B. Getty.

J. McC.

DEVLIN v. LONDONDERRY COUNTY COUNCIL.

Assize
Court,
1943.

*Criminal injury—Malicious damage to tank containing live eels—
Escape and loss of the eels—Claim for compensation for loss
of the eels—“ Destroying or injuring property ”—Local Govern-
ment (Ireland) Act, 1898 (61 & 62 Vict., c. 37), sec. 5.*

May 7, 13.

The owner of live eels kept them in a tank, his property, in a lake. The tank was maliciously damaged with the result that the eels escaped and were lost. On a claim by the owner for compensation for criminal injury under the Local Government (Ireland) Act, 1898, sec. 5.

Held, that the claim was not sustainable in respect of the eels.

APPEAL to the Judge of Assize from an Order of the County Court Judge of County Londonderry refusing an application for compensation for criminal injury.

The applicant was the owner of live eels which he kept in a tank in a lake. The tank was maliciously damaged with the result that the eels escaped and were lost.

McCoy, K.C., for the applicant.

Hanna for the Cookstown Rural District Council.

McVeigh for the Magherafelt Rural District Council.

MURPHY, L.J.: This Criminal Injury appeal came before me at the Spring Assizes for the County of Londonderry when Mr. McCoy, K.C. (counsel for the applicant and appellant) explained that it raised a very interesting question of law on facts which were not in dispute, and, by consent, the hearing was adjourned to Belfast. Accordingly on the 7th May, I heard the case fully argued by counsel, and would wish to express my indebtedness to them for their most interesting and helpful arguments.

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MURPHY,
L.J.

As the injury done to the tank itself is valued at £1 only, Mr. McCoy stated that he could not claim the loss of the eels as consequential damage, and I am not therefore asked to express any opinion on the vexed question as to the right to recover compensation for consequential damages, and the effect of the judgments in *Tyler and Sons v. Cork County Council* (1), *McKnight v. Armagh County Council* (2), and *Leyburn v. Armagh County Council* (No. 2) (3), in which this question was discussed.

Mr. McCoy argues that the loss of these eels comes within the words of section 5 of the Local Government (Ireland) Act, 1898, pointing out that, in so far as they differ, the words in section 5 "property" of any description whether real or personal" are more general than the corresponding words ("any "real or personal property whatsoever") in section 51 of the Malicious Damage Act, 1861. He submits that once these eels (creatures *ferae naturae*) had been captured and confined in this tank they were the "property" of the applicant, and although this property was admittedly qualified (for it clearly ceased to be, once the eels had escaped out of the damaged tank), yet so long as the eels remained in the tank they continued to be the applicant's property, and that it was this property which was "destroyed" or injured" by the miscreant who damaged the tank with the clear intention of depriving the applicant of the eels contained in it. He referred me to the case of *Purcell, Applicant; Minister for Finance, Respondent* (4), in which the facts were in all material respects identical with those in the present case, and on these facts a remarkable division of judicial opinion in the Courts of Eire resulted. The Circuit Court Judge (Judge McElligott) having given a decree for £3 for the damage to the eel tank and £60 in respect of the live eels which had escaped, the two Judges in the High Court differed, Johnston, J., holding that the applicant was entitled to an award of compensation in respect of the eels, and Gavan Duffy, J., holding

(1) [1921] 2 I.R. 8.

(2) [1922] 2 I.R. 137.

(3) [1922] 2 I.R. 58.

(4) [1939] I.R. 115.

that he was not so entitled; while in the Supreme Court, Sullivan, C.J., and Fitzgibbon, J., agreed with Gavan Duffy, J., that the applicant was not entitled to such compensation and Murnaghan, J., and Meredith, J., agreed in the result with Johnston, J., though for different reasons.

A decision of the Courts in Eire is not binding on me, and in this case there was an equipoise of judicial opinion, but I have, of course, considered the judgments of the learned Judges (with the assistance of counsel and since the argument before me) with close attention and very great interest. Portions of these judgments are necessarily devoted to a consideration of Eire Statutes which have no application to the present case, but all the six Judges did express their views on the application of section 5 of the Local Government (Ireland) Act, 1898, and section 51 of the Malicious Damage Act, 1861, to the present state of facts.

I may say that I cannot adopt the view of Johnston, J., that the eels and the eel tank constituted one entity, nor am I impressed by the metaphysical reasoning of Meredith, J., as to "property," based on the difference between the state of eels in captivity and the state of the same eels when free. The practical distinction is obvious, but I cannot accept the subtle argument that some abstract idea of captivity as distinguished from liberty satisfied the test of property injured within the meaning of section 5 of the Local Government (Ireland) Act, 1898. Mr. McCoy does not contest the principle established by such cases as *Laws v. Eltringham* (1), *Gardner v. Mansbridge* (2), and *Ashtown v. Waterford County Council* (3), that incorporeal rights do not come within the description of property in section 5, and I think that the reasoning on which Sullivan, C.J., based his judgment (with which judgment Fitzgibbon, J., agreed) is consistent with the earlier decisions and should be preferred to that of Murnaghan, J.

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(1) 8 Q.B.D. 283.

(3) [1909] 2 I.R. 125.

(2) 19 Q.B.D. 217.

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L.J.

I am impressed by the importance attached by Palles, L.C.B., in *Meredith v. Kerry County Council* (1), and in *Lansdowne v. Kerry County Council* (2), to "an actual injury to the soil" (i.e., in each case the bed of a river) especially as the "injury" in *Meredith's case* (1) only amounted to this, that traces of lime which had been used for poisoning the trout and salmon in the river Flesk "could be seen in the bed of the river," and the learned Lord Chief Baron held that "the physical portion of the earth's surface over which this river runs" had been injured "as a place to which fish would come."

It is also to be observed that if in the present case the eels had been stolen by the miscreant who damaged the tank Mr. McCoy admits that *McDowell v. Dublin Corporation* (3) and other cases, would be a fatal obstacle to an application for compensation for the stolen eels, and I do not think that the ingenious argument which he advances as to "dominant motive," or the possibility that the theft in such cases could be committed by a person or persons who did not do the physical damage to the structure, sufficiently accounts for the striking anomaly which would result if an applicant could recover compensation for eels which had escaped out of an eel tank maliciously damaged but not for eels stolen out of it.

I may say that I recognize that the present applicant has suffered serious loss as a result of the malicious damage done to his eel tank for which he, naturally, considers that compensation should be recoverable, but as in all these cases where innocent ratepayers are called on to pay compensation for criminal acts, a Judge's duty is to "*stare super antiquas vias*" and not to apply the Criminal Injury Code to any case which is not clearly brought within the words of the sections as explained in the reported cases. I agree with Sullivan, C.J., that to bring his case within the sections an applicant must show "that some tangible property of which he is the owner has been injured

(1) 45 I.L.T.R. 169.

(2) 48 I.L.T.R. 58.

(3) [1903] 2 I.R. 541.

“or destroyed.” The present applicant on the agreed facts is unable to show this, and in my opinion his claim for compensation necessarily fails.

Assize
Court,
1943.

Solicitor for the applicant : *L. R. Hastings.*

DEVLIN
v.
LONDON-
DERRY
COUNTY
COUNCIL.

Solicitor for the Cookstown Rural District Council :
R. H. Twigg.

MURPHY,
L.J.

Solicitors for the Magherafelt Rural District Council :
P. J. Agnew & Son.

J. McC.

K.B.D.
(Matrimonial)
1943.

BLACK v. BLACK.

Feb. 2, 9.

Divorce—Desertion—No offer by deserting spouse—Petitioner guilty of misconduct—Exercise of discretion to grant relief.

The petitioner and the respondent were married on 11th April, 1928. In August, 1930, the respondent, the wife, left the petitioner's house and remained away for some months. On several subsequent occasions she left the house and remained away for some time. In May, 1935, she again left the house and she never returned. Since then the petitioner never went to see the respondent and never wrote to her. Until six months after the respondent finally left the petitioner's house he was willing to take her back but not after that time. The respondent never expressed any wish for a reconciliation. After the petitioner was satisfied that the respondent did not intend to return he began to associate with another woman by whom he had a child in 1937, and whom he promised to marry if he obtained a divorce.

Held, that the petitioner was entitled to a decree for divorce, and the discretion of the Court ought to be exercised in his favour.

HUSBAND'S petition for divorce on the ground of desertion by the wife.

The facts appear in the judgment.

Hanna for the petitioner.

There was no appearance for the respondent.

ANDREWS,
L.C.J.

ANDREWS, L.C.J. : This is a husband's undefended petition for divorce on the ground of his wife's desertion. Married on 11th April, 1928, there are two children, who were born on 9th October, 1928, and 11th February, 1930, respectively. According to petitioner's evidence his wife first left him when the younger child was about six months old. She stayed away for some months at her mother's house, and a letter which he wrote to her evoked no reply. The petitioner then got his mother to write to her reproving her for leaving the young child, and a short time afterwards she returned. She assigned to him as her reason for leaving him that he

associated with other women—a charge which the petitioner says that he denied. This was only the first of several occasions on which the respondent left her husband, the final separation occurring in May, 1935. On one of these occasions—some 10 years ago—she took proceedings against the petitioner for maintenance, but this summons was, it is alleged, dismissed, when the petitioner expressed his willingness to take his wife back and she refused to go. Since the respondent left in May, 1935, to reside with her mother near Comber, the petitioner has not written to her or gone to see either her or the youngest child whom she took with her. Asked by his counsel if he was still prepared to take her back, he replied, after a little reflection, that he was so prepared until he gave up his house six months after she left; and he added, in reply to a further question which I put to him, that he had made up his mind that he was finished with her after the six months had expired.

The only question to be considered (apart from the discretion statement to which I shall refer later) is whether this attitude—his unwillingness to take her back since, say, the end of 1935, disentitles him to the relief which he now seeks. In my opinion on the authorities and in the circumstances of the present case it does not. In his judgment in *Sifton v. Sifton* (1), at p. 226, Henn Collins, J., said:—"I was inclined at "one time to take the view that it was incumbent "in the circumstances upon the husband to show "that he was at all times during the statutory period "up to the service of the petition ready and willing "to receive his wife, but I am satisfied by the authorities "that this is not so." The position would, of course, be entirely different if the respondent had made what in the opinion of the Court was a bona fide offer to return which ought to have been accepted. Here there was no such offer. I dealt with this question in my judgment in *Cairns v. Cairns* (2), at p. 189, where, after examining certain of the authorities, I set out three propositions which appeared to me to emerge

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(1) [1939] P. 221, 226.

(2) [1940] N.I. 183.

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therefrom, and I added that, "in general, the question
"of willingness or preparedness on the part of the
"injured spouse to take the other back only properly
"arises for the consideration of the Court if and when
"that other who is in desertion has prior to suit
"expressed, or in some manner manifested, a wish
"or desire for reconciliation. It is for the one who
"has acted wrongfully to give evidence of a change
"of heart or of mental attitude on his or her own
"part before he or she can search the heart or mind of
"the other party."

If further support be required for the soundness of the view which I thus expressed I think it will be found in the more recent case of *Ware v. Ware* (1). In that case Bucknill, J., pointed out the limitation which must be placed on the doctrine of *Pratt v. Pratt* (2), in which it was held that if at any time during the three years preceding the presentation of the petition a deserting wife or husband makes a genuine offer to return to the other spouse, and the other spouse refuses to accept that offer, the desertion is terminated. That principle, he said, could only be applied if the Court is satisfied that there is a genuine offer to resume co-habitation and to behave properly as husband or wife, as the case may be. It seems to me that if the husband, as the deserted spouse, is thus entrusted with the power to reject an offer which the Court subsequently agrees with him was not a bona fide offer, he certainly cannot be considered to be under any legal obligation to be in a state of constant willingness or preparedness to accept his wife back where in fact no offer, either genuine or otherwise, is made at all.

I now pass to the discretion statement which recites the principal events of the married life, and contains a specific denial by the petitioner of the allegation that he had been keeping company with any woman, or that he was guilty of any act which could have led to his wife leaving him. Then follows a reference to his association with an unmarried woman with whom he committed adultery in December, 1936. As a

(1) [1942] P. 49.

(2) [1939] A.C. 417.

consequence a child was born to them on 19th September, 1937, to whose maintenance he has since contributed ten shillings weekly. He further asserts in the discretion statement that he did not meet the woman with whom he thus committed adultery until after he realised that his wife did not intend to return to him, and that he never was guilty of any matrimonial offence with any other woman. Finally, he declares their mutual attachment to one another, and his promise to her, if he can secure his freedom, that he will marry her. All these statements he has to-day confirmed on oath.

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No definite rules have been or should in my opinion be laid down within which a discretion should be exercised by the Court in favour of a guilty petitioner save that it is a jurisdiction which should be exercised cautiously after every aspect of the case has been considered, with due regard not only to the parties themselves, and to the interests of public morality, but also to the consequences which would ensue from the refusal of a decree. Cases illustrating the application of these principles will be found conveniently collected in the recently published edition (4th) of *Rayden on Divorce*, at pp. 146-148. I am of opinion that I would not be acting in consonance with these authorities were I to refuse to exercise my discretion in the petitioner's favour in the present case.

It may well be that if this suit had been defended, and, in particular, if the respondent had sought relief by cross-petition or prayer, further facts might have been elicited which would have produced a different result. I can, however, only decide the case on the facts before me, deriving some measure of confidence from the fact that there is no collusion whatever in the proceedings, and that the respondent was, accordingly, a perfectly free agent to defend the petition if she had so desired.

Solicitor for the petitioner : *S. V. Tughan*.

J. McC.

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1943.

ATTORNEY-GENERAL FOR NORTHERN IRELAND
v. MINES.

Jan. 19.
Feb. 2.

Customs offence—Conviction—Penalty of treble the value of the goods—Death of the defendant—Recovery of penalty from personal representatives—Customs Consolidation Act, 1876 (39 & 40 Vict., c. 36), sec. 186—Customs and Inland Revenue Act, 1879 (42 & 43 Vict., c. 21), sec. 11.

J. J. was convicted at Petty Sessions under section 186, Customs Consolidation Act, 1876, for being knowingly concerned in dealing with the importation of goods illegally, and a penalty of treble the value of the goods was imposed. He died without having paid the amount.

Held, by Megaw, J., that the fine was a debt due to the Crown and was recoverable from the executors of the deceased.

SUMMONS FOR ADMINISTRATION.

John Jeffers was charged at Petty Sessions with being knowingly concerned in dealing with five tons of sugar imported from Eire into Northern Ireland with intent to defraud the Crown of the Customs duty payable thereon, contrary to section 186, Customs Consolidation Act, 1876. He was convicted on 8th July, 1941, in respect of the offence and ordered to pay £490, being treble the duty-paid value of the goods, and it was ordered that in default of payment the defendant be imprisoned for three months.

Jeffers appealed against the conviction and sentence which were affirmed at Quarter Sessions on 6th October, 1941.

Jeffers died on 12th October, 1941, and probate of his will was granted to the defendants on 4th June, 1942. No part of the penalty was paid by Jeffers, nor was he imprisoned for the non-payment of it.

The summons was brought by the Attorney-General on behalf of the Commissioners of Customs and Excise to determine whether the defendant as the executors of Jeffers were liable to pay the amount of the penalty, and, if necessary, for an order for the administration of his estate.

MacDermott, A.-G., and Patton for the plaintiff :—

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The sum of £490 is a debt due by the deceased and is therefore recoverable from his personal representative. Section 14, Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. (1 Edw. 8 & 1 Geo. 6, c. 9). The penalty is recoverable by action of debt. Section 11, Customs and Inland Revenue Act, 1879. *R. (Sherry) v. The County Court Judge of County Fermanagh* (1). The fact that imprisonment is an alternative penalty for the offence does not make the penalty irrecoverable as a debt. *R. v. Woolf* (2); *Butler v. Butler* (3); *Attorney-General v. Aldersay* (4).

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Warnock, K.C., and Sheil for the defendants :—

Section 15 Finance Act, 1935, destroys the *ratio decidendi* of *R. (Sherry) v. County Court Judge of County Fermanagh* (1). The effect of sections 186 and 232, of the Customs Consolidation Act, 1876, is that the Crown may proceed either in the Exchequer Division for the recovery of the amount of the penalty, or may prosecute at Petty Sessions with the object of committing the accused to prison. The Crown has here elected to prosecute at Petty Sessions and cannot now sue for recovery of the amount of the debt.

MEGAW, J. : I am satisfied that the defendants as executors of the estate of John Jeffers are liable to pay the sum of £490. I have come to this conclusion on the ground that the sum is a debt due to the Crown, and for the purpose of the present application I do not consider it necessary to determine whether the penalty was imposed in a civil or criminal matter, or whether the decision in *R. (Sherry) v. County Court Judge of Fermanagh* (1) has been affected by subsequent legislation. From the date of the decree the penalty was a debt due and payable to the Crown. Though in the event of non-payment of the penalty the convicting justice had power under section 232, Customs

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(1) [1935] N.I. 211.

(3) 1 East. 338.

(2) 2 B. & Ald. 609.

(4) 1 East. 341.

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Consolidation Act, 1876, to convict the deceased to gaol, this fact did not remove the liability of the deceased to pay the debt to the Crown which did not carry lesser incidents than would an ordinary civil debt. The law on this matter is, in my opinion, accurately stated by Bayley, J., in *R. v. Woolf* (1): "Here there is a judgment that the defendant pay to the King a fine of a certain sum. By that judgment the debt becomes a debt to the King, of record; and it is payable to the King instanter. It is true, that part of the judgment is also, that if at the expiration of the imprisonment the fine shall not be paid, he is to continue in prison until it is paid; but that is only for a further remedy on behalf of the Crown; and if we were to say that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the Crown in a worse position than any subject."

Therefore, in my view, the Crown is entitled to the remedy sought in a declaration of indebtedness by the defendants and to an order for administration.

NOTE.—The defendants appealed, but counsel for the appellants having stated that he was satisfied that the appeal could not succeed, the Court of Appeal dismissed the appeal.

Solicitor for plaintiff: *Chief Crown Solicitor*.

Solicitor for defendants: *Corr & O'Connor*.

M.W.G.

(1) 2 B. & Ald. 609.

BLOOD v. COTTON.

C.A.
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Solicitor and client—Breach of duty—Loan to client—Solicitor and another, Mortgagees—Loan less than sum recited in mortgage deed—Ambiguity of solicitor's accounts to client—Action against solicitor to indemnify client—Solicitor's duty to render accurate and intelligible accounts.

 Dec. 10, 11.
1943.
Mar. 9.

The plaintiff agreed to purchase a house for £1,250 and paid £150 deposit. The defendant, being the plaintiff's solicitor, obtained for her £1,100, the balance of the purchase money, from another client, W., on the security of a mortgage of the house executed by the plaintiff in favour of W. and the defendant, the defendant being joined as a prospective trustee for W. The mortgage recited that the mortgagees had agreed to lend £1,200 which the mortgagor covenanted to pay with interest thereon in the meantime. In fact the plaintiff received £1,100 from the mortgagees, and she also owed the defendant his costs as solicitor. For several years the plaintiff paid interest on the mortgage treating it as a proper mortgage for £1,200. In July, 1939, the plaintiff asked the defendant for particulars of her account and the defendant sent her an account which credited her with *inter alia* a loan from the trustees of £100. This was the first time that this alleged loan appeared in the accounts.

The plaintiff, alleging that the mortgage was executed by her in ignorance of its purport through the defendant's breach of duty, claimed to be indemnified in respect of £100 and interest payable thereon secured by the mortgage and an account of interest paid by her on this £100.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.J.J.) that as the amount advanced and secured was £1,100, not £1,200 as recited in the mortgage, and the £100 difference was incapable of satisfactory explanation, the defendant was liable and must indemnify the plaintiff in respect of her loss. The defendant neglected his duty to safeguard his client and he was guilty of negligence by treating the mortgage as security for his own costs as well as for the loan of £1,100.

APPEAL from decision of Megaw, J.
The facts are stated in the judgment.

Porter, K.C., and *Hanna* for the appellant.
Lowry, K.C., and *Patton*, for the respondent.

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The judgment of the Court was delivered by
Babington, L.J.

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BABINGTON, L.J.: In this action the plaintiff sues the defendant, formerly her solicitor, claiming that she be indemnified in respect of a sum of £100 and interest thereon which she says she has wrongly become liable to pay under a mortgage executed by her in ignorance of its purport and effect through the negligence and breach of duty of the defendant, and for an account of the interest paid by her on this £100 and of other monies received and paid by the defendant as her solicitor.

The questions in dispute arise out of the purchase by the plaintiff of a house, in which transaction the defendant acted as her solicitor. Prior to 31st December, 1925, the plaintiff agreed to purchase this house from the owner, one Victoria Jolly, for whom also the defendant was solicitor, for £1,250 and paid the defendant the sum of £150 in cash as deposit.

The plaintiff was not in a position to produce any more ready money and the defendant attempted to procure a loan for her from the Belfast Corporation under the Small Dwellings Acquisition Act, 1899. This application was unsuccessful and the defendant then undertook to find the balance of the purchase money himself. He did so from the funds of a third client, one Lizzie Wilson, who agreed through the defendant to advance £1,100, the balance of the purchase money, on the security of a mortgage of the house to be executed by the plaintiff.

There is no evidence as to the knowledge or intentions of Lizzie Wilson, all the negotiations on her behalf having been conducted by the defendant who said that he "*had complete discretion as to investment*" and paragraph 5 of the Defence sets out that the defendant became interested in these moneys as a prospective trustee for Lizzie Wilson, who had expressed her intention of settling them. Subsequently by Declaration of Trust, dated the 21st November, 1926, the monies secured by the mortgage executed by the plaintiff became, along with other monies, the subject

matter of a declaration of trust made by Lizzie Wilson and the defendant jointly in favour of a Mrs. Ferguson, and this Declaration merely recites that Lizzie Wilson and Dawson Cotton were possessed of the cash, stocks, funds, securities and investment in respect of which the trusts were declared without defining their interests.

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The assignment of the house was completed on the 31st December, 1925, the consideration being £1,250, of which £150 had been already paid, leaving £1,100 due, and on the 1st February, 1926, the plaintiff executed a mortgage of the house to Lizzie Wilson and Dawson Cotton.

This mortgage recited that the mortgagees had agreed to lend to the mortgagor the sum of £1,200 and witnessed that in consideration of the said sum of £1,200 the mortgagor covenanted with the mortgagees to pay on the 1st day of May then next the said sum of £1,200 with interest thereon and on any further sums which should be in the meantime advanced to the mortgagor by the mortgagees at the penal rate of £7 reducible to £6 per cent. per annum. This mortgage is challenged by the plaintiff in so far as it secures more than the £1,100 balance of the purchase money, and this is the main issue in the present action.

The plaintiff also owed the defendant his costs as solicitor and the purchaser's costs were charged against her at the full scale fee although the defendant had also charged the full scale fee to the vendor. This was an improper charge to the plaintiff but the defendant seeks to justify it on the ground that he had done other work and that he discussed it with the plaintiff and explained it to her when she signed the mortgage. The plaintiff on the other hand says that she had "no conversation with Cotton before this "action brought in relation to mortgage."

We express no opinion as to whether a solicitor can justify an overcharge contrary to the statute or charge up miscellaneous items under a misleading and inappropriate heading by reference to a special agreement with his client, or, assuming that he can do so, as to what evidence of the special agreement must be forth-

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coming. These questions do not directly arise in the present case and if this charge is to be contested it will have to be done directly in the appropriate way.

The plaintiff has paid interest at six per cent. per annum on the mortgage since its execution treating it as a valid mortgage for £1,200 but says that she only became aware in 1939 that the mortgage was for £1,200. The learned Trial Judge has found against the plaintiff on this issue, saying: "I was convinced that plaintiff "was fully aware of the amount which defendant "contended from the initiation of the transaction was "secured by the mortgage and that in the circum- "stances the accounts must be regarded as settled in "respect of the amount due under the mortgage"; and if this were a transaction free from ambiguity, simple to understand and advised by a solicitor without any personal interest to serve, the finding of the Trial Judge might not be open to review in this Court. The transaction, however, is not free from ambiguity or easy to understand, and the learned Judge himself goes on to say: "I was not satisfied as to defendant's "explanations as to the £100 entries," and then proceeds to dispose of his doubts by holding that "plaintiff's delay in her challenge of the accounts "furnished and acquiescence in them were matters I "could not leave out of sight in forming my decision," and accordingly dismissed the action. We have considered with some care how this £100 came to be added to the £1,100 balance of the purchase money. The mortgage itself affords no clue, £1,200 being stated to have been advanced by the mortgagees as one sum. It is therefore necessary to look at the evidence and the subsequent dealings between plaintiff and defendant to ascertain what really took place.

One matter is beyond dispute. The £100 was no part of the purchase money.

Paragraph 8 of the Defence says: "The sum of "£1,200 was advanced by the said Lizzie Wilson for the "payment of the balance of the purchase money of "the said house, and the defendant's costs charges "and expenses amounting to £105 16s. 4d. upon the "understanding that £100 part thereof would be

“repaid to the said Lizzie Wilson at an early date.”

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We repeat here that the defendant joined in the mortgage as a prospective trustee for Lizzie Wilson and not in his personal capacity as solicitor for the plaintiff, and his costs were therefore not secured by the mortgage, and, even if they were, the consideration is not truly stated for in fact Lizzie Wilson never advanced this £100 to the plaintiff and thus there could never have been any understanding that the £100 should be repaid to her.

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Mr. Lowry during the argument said that the £100 was added to the mortgage monies as “cover” for the defendant’s costs but the only way in which the defendant could have availed himself of this cover would have been by an agreement with Lizzie Wilson that she and he as prospective trustees would advance the £100 to the defendant in payment of his costs, and treat it as secured by the mortgage. This was not done and could not have been done by the defendant without the consent of the plaintiff through whose hands the money would have had to pass. In this transaction the defendant in endeavouring to secure the payment of his own costs brought his own interests and the interests of his client into direct conflict, and if the mortgage was intended to confer an advantage on him over and above his ordinary rights as her solicitor he should either have ceased to act for her or have made the transaction clear in its terms and proved his client’s knowledge and approval beyond doubt.

The defendant who had been solicitor for the vendor was then solicitor for the plaintiff, solicitor for the mortgagees, solicitor for Lizzie Wilson, and he was personally interested in the payment of his costs by the plaintiff.

He says he “gave the explanation of how the £1,200 “was made up.” “They (the plaintiff and her “husband) perfectly understood the document.”

What precise explanation of this transaction he gave the plaintiff or his other client, Lizzie Wilson, who had already agreed to advance £1,100 on the security of the house purchased for £1,250 does not appear. The

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plaintiff said she signed the mortgage but did not remember whether she made any enquiries, and that Cotton acted as her solicitor and she had full confidence in him.

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We now come to the transactions subsequent to the date of the mortgage and proved in evidence.

The defendant delivered to the plaintiff his bill of costs on the 13th May, 1926, made up of two scale fees of £34 10s. 0d. in respect of the assignment and the mortgage, together with £16 10s. 0d. for outlay, £85 10s. 0d. in all, together with an account of payments and receipts, one of which was "Loan from "Trustees Wilson £1,100," and bringing out a balance due to him of £105 16s. 4d., which is the sum referred to in paragraph 8 of the Defence.

There is no mention in this account of the £100 or of any other sum over and above the £1,100 being secured by the mortgage or having been advanced by Lizzie Wilson.

A further account was delivered on the 9th July, 1930, which starts with the £105 16s. 4d. as being due, credits a number of payments by the plaintiff between December 10th, 1926, and July 1st, 1930, and claims a balance then due to the defendant of £25 16s. 8d. In this account the loan is again set out as being £1,100 and there is no mention of any security having been given for costs or of any money having been raised to defray them.

From an early date the defendant appears to have been apprehensive as to whether his costs would be paid, and the covering letter sent along with the bill of costs and account of the 13th May, 1926, contained the following statement: "We now send you note of "costs and cash account made up to 2nd February "last, the interest being included to 31st January, "1926. The mortgage was for £1,100 and further "advances up to £1,200 but as we have only received "£1,100 from the lenders there is a balance of "£105 16s. 4d. which you will now have to arrange "to discharge." The mortgage was in fact for £1,200 and it was stamped for further advances up to £1,400 and it is strange that this letter should have been

written by the defendant if the consideration was therein truly stated. This letter in our opinion is conclusive against the defendant. It admits that only £1,100 was advanced on the mortgage, and, by some confused process of reasoning which we are unable to follow, it appears to treat the £105 16s. 4d. which represented costs due to the defendant as a balance due on the mortgage.

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There is no allegation of fraud on the pleadings and we must therefore treat the case as one of error and the defendant may possibly have thought that the costs due him could be treated as further advances under the mortgage. This suggestion was in fact put to us in argument and we were invited to hold that the plaintiff had received value for the extra £100 and that she was therefore at no loss. What she in fact received was credit for her costs and no monies were advanced to her upon security of the mortgage either as being part of the purchase money or further advances to enable her to discharge them. The defendant's own statements as to the effect of this mortgage cannot be reconciled and on 22nd June, 1926, he wrote: "We shall be glad if you will let us hear from you with your proposals as to reduction of the balance due to us." This treats the balance as being due to the defendant's firm and negatives the suggestion now made that it was due to Lizzie Wilson.

This correspondence went on, the defendant from time to time pressing for payment of interest and later of principal, by which he meant his costs. We will not go through all the correspondence but on the 18th June, 1932, the defendant wrote: "The lenders point out that they have not received any payment on account of the capital for a considerable time," and on the 4th August, 1932, "owing to your payments being in arrear the lender threatens to call in the loan."

In fact the plaintiff had never made any payment on account of capital and what the defendant was pressing for was not payment of capital but payment of his costs, no interest on the mortgage being in

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arrear up to May, 1933. In this correspondence the defendant was using the supposed claims of his other clients, the Wilson trustees, as a lever to enforce payment of his costs on the basis that they were capital monies secured by the mortgage, and the defendant was himself the sole trustee at this time, Lizzie Wilson having died on 29th April, 1930, and he continued to be sole trustee until 18th June, 1935, when a new trustee was appointed in her place. That he was so using the supposed claims of the Wilson Trustees is clear from a letter of 17th December, 1932, from the defendant to the plaintiff in which he says: "We are "being pressed regarding the arrears of your monthly "payments," and again on 9th March, 1933, "the "lenders insist that regular monthly payments be "made to reduce the capital."

Then on 13th April, 1933, the defendant issued a writ against the plaintiff under the covenant in the mortgage for £1,100 as money lent by Lizzie Wilson and himself out of a joint account. The endorsement sets out that interest had been paid up to 1st November, 1932, and the next instalment was not due until May, 1933. Negotiations took place as a result of these proceedings, and on the 24th April, 1933, the defendant wrote: "If you can arrange for payment "of £21 5s. 0d. quarterly it will be satisfactory until "you see how you can manage," and the plaintiff undertook to make such payment by letter of the 27th April, 1933. Judgment in the action was marked by the defendant on the 25th April while these negotiations were proceeding and no suggestion was made to the plaintiff that she should be separately represented or take independent advice, and the plaintiff swore that she did not know judgment had been marked until she consulted her present solicitors in 1939.

The plaintiff has paid interest on the full £1,200 secured by the mortgage and is still paying it, and Mr. Lowry expressly stated before us that all this interest, including that paid in respect of the £100, was credited by the defendant to the trust, but there is no evidence as to this. We assume that this statement is correct but we cannot understand how the defendant in

discharge of his duty as solicitor for the plaintiff allowed her to continue paying it or accepted it in his personal capacity as mortgagee being well aware that the £100 had not been advanced.

After the arrangement made between the plaintiff and the defendant as a result of the issue of the writ claiming repayment of the mortgage monies as being £1,100 and no more, the plaintiff paid and continued to pay £21 5s. 0d. quarterly, which included interest on the £1,200 secured by the mortgage and instalments in discharge of her liability for costs, until July, 1939, when she called for detailed particulars of her account.

On 21st July, 1939, the defendant wrote to the plaintiff, saying: "We now send you detailed particulars of account which shows a balance to your credit of £40 5s. 1d., for which we also enclose cheque." That account begins by debiting the plaintiff with the £105 16s. 4d., being the balance due by her on the account of the 15th May, 1926. This balance was made up of £85 10s. 0d. on foot of defendant's bill of costs of the same date and a balance due in respect of other items in connection with the sale paid by him on plaintiff's behalf after crediting certain payments by her on account. It then credits her under the date, May 13th, with a further loan from the Trustees Mrs. E. Wilson of £100, leaving an adverse balance of £5 16s. 4d. against the plaintiff. This is the first time this alleged loan appears in the accounts and the entry is untrue. No further loan was made at any time by the Wilson Trustees over and above the £1,100 purchase money and, as Mr. Porter pointed out during the argument, the £105 16s. 4d. had been paid off before this account was furnished for the balance due on the 13th May, 1926, account was only £23 16s. 8d., and, omitting the first item on the credit side of the 1939 account under date the 10th December, 1926, which was included in the £105 16s. 4d., this balance was discharged by payments therein credited, the final payment being £3 on February 20th, 1928, while on the debit side the first item is 31st January, 1932, "charges till date."

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On the defendant's own case the plaintiff's liability for the costs of sale was therefore discharged on this date but no receipt was endorsed on the mortgage apparently because the defendant was trying to hold the plaintiff to her liability for the £100 as security not only for the costs of the sale and mortgage but for all or any further costs for which she might from time to time become liable to the defendant, a claim devoid of any justification.

We cannot understand these further accounts. They include £6 15s. 6d., the costs of obtaining the judgment, they contain further charges and credit the plaintiff with payment of the £21 5s. 0d. quarterly out of which the interest, which was never seriously in arrear, was discharged, and bring out as a balance in the plaintiff's favour the £40 5s. 1d. already referred to. We pass no judgment on the accuracy of these accounts but we hold that their form is wrong and misleading and that they are not such accounts as the plaintiff was entitled to receive from her solicitor and an officer of the Court.

There remain two entries in the defendant's day book to which reference must be made.

Under date 28th July, 1926, he records an attendance on the plaintiff in the following terms: "Attending you, explaining accounts (which must have been the 13th May, 1926, account showing £105 16s. 4d. due) and we had only succeeded in getting £1,100 on mortgage balance having been advanced by us." If this means anything it must be that he and not the Wilson Trustees had advanced the extra £100 included in the mortgage, that is to say, he had advanced £100 to his own client to pay his own costs which £100 then became secured by the mortgage. In fact he never advanced any money and this entry is untrue, and we are not surprised that Megaw, J., was not satisfied as to the defendant's explanations of the entries relating to this £100. They are altogether inconsistent and cannot be reconciled with the admitted facts.

Then under date 19th April, 1933, six days after the issue of the writ by himself in his capacity as sole trustee of the Wilson Estate calling up the mortgage

monies, the defendant has this entry: "Attending you and your husband when you called and we discussed the present position. Informing you that in the circumstances we had no option but to proceed as we were trustees and must take every step to protect the trust estate—also informing you that if we came to a temporary arrangement as to quarterly payments by you we would not execute the judgment or register same against you so that there would not be any publicity, but if there was not any arrangement we should have to take whatever steps necessary to protect the interests of the beneficiaries, and also informing you that it would not be possible to release you from the liability on foot of the mortgage." This arrangement was as we have seen completed on the 27th April by plaintiff's confirming letter of that date, but we now know that on the 25th April, the day after his offer to accept £21 5s. 0d. quarterly, the defendant marked judgment against his own client without telling her he had done so and in breach of his own written promise.

Upon this entry it is to be observed that the defendant was not trying to protect the Trust Estate. Interest was paid to date and he had no intention of calling in the capital for if he had the action would have been prosecuted. Here again the defendant was forcing the hand of his client ostensibly in his capacity as solicitor for the mortgagees (of whom he was one) but in reality to enforce payment of his own costs and he was at the same time being paid by her as his client, for the account of 21st July, 1939, contains a series of charges by him presumably for costs, the last being on the 31st January, 1938, £6 6s. 0d., and in the same account the costs of the judgment recovered against the plaintiff and payable to him as solicitor for himself, amounting to £6 10s. 0d., appears after two charges against her as his own client.

After the receipt of the account of the 21st July, 1939, the plaintiff consulted her present solicitors, and they wrote on the 4th August to the defendant challenging the accounts in a number of items, particularly the plaintiff's alleged liability to the Wilson

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Trustees for the £100 and the interest paid thereon, and no answer beyond an acknowledgment being forthcoming, the writ in the present action was issued on the 8th February, 1940. The statement of claim prays for a declaration that the plaintiff is entitled :—

- (a) to be indemnified by the defendant against payment of the said sum of £100 and against all interest paid or to become due on same ;
- (b) for an account of all moneys received and paid by the defendant as solicitor and agent for the plaintiff in the purchase of the said house ;
- (c) an account of the interest paid by the plaintiff on the said sum of £100 and for payment of the amount so found due ;
- (d) damages for the negligence and breach of duty by the defendant as solicitor and agent of the plaintiff.

Megaw, J., dismissed the action, saying that he was convinced that the plaintiff was fully aware of the amount which defendant contended from the initiation of the transaction was secured by the mortgage and that in the circumstances the accounts must be regarded as settled in respect of the amount due under the mortgage. He does not deal with the substantive question as to what amount was in fact advanced and secured, and he appears to have accepted the defendant's oral statement without any very close analysis, though he qualifies this by saying that he was not satisfied as to the defendant's explanation as to the £100 entries.

In his oral evidence the defendant said that the £100 advanced was temporarily held in suspense and that he explained to the plaintiff how the £1,200 was made up at the time of the execution of the mortgage. It does not appear from the note of his direct evidence what that explanation was, but his answers on cross-examination, which are far from clear, suggest that the £100 was only retention money brought to the plaintiff's credit in some way which he has been unable to explain. Even if we assume this to be correct and the transaction to have been legally carried out, the suspense or retention came to

an end when the defendant's claim for £105 16s. 4d. was discharged as it was on the 28th July, 1929, but notwithstanding this, the case made before us was that the plaintiff is still liable to repay the £100 to the Wilson Trustees and for interest in the meantime at the rate current under the mortgage, and that if this if not so her proper remedy is against the Wilson Trustees. We reject this argument. The plaintiff was never liable for anything more than £1,100 under the mortgage and if she has been so made liable it was through the act of the defendant in breach of his duty towards her.

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On these facts the plaintiff has made out her case for relief. She received £1,100 only from Lizzie Wilson and the defendant's costs were not secured by the mortgage and remained costs until they were finally discharged by payment. The mortgage being for £1,200, the plaintiff has in error become liable to the Wilson Trustees for £100 over and above the sum advanced and has paid and is liable to pay interest on this sum so long as the mortgage is outstanding.

We have reviewed this transaction and we are satisfied upon the documents and of the defendant's oral evidence that it is incapable of satisfactory explanation, and accordingly that it could not have been made clear to the plaintiff and that she could not have understood it.

The defendant is therefore liable and must indemnify her in respect of her loss.

He was responsible at every stage and his first duty was to safeguard his client. He failed in this duty and having himself drawn the mortgage and having maintained to the end that it secured not only the purchase money but his own costs, he was guilty of negligence.

It was suggested in argument that if there is any error in the mortgage the plaintiff has her rights against the Wilson Trustees and that her proper remedy is against them. It may be that she could have taken proceedings against the mortgagees but we think she is entitled to sue the defendant, who is responsible for her loss, rather than the mortgagees

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who may have defences not open to him in respect of both capital and interest.

We therefore grant the declaration prayed for at (a) in the Statement of Claim, namely, that the plaintiff is entitled to be indemnified by the defendant against payment of the sum of £100 being the difference between the sum secured by the said mortgage and the sum actually received by the plaintiff, and against all interest paid on the said sum of £100 and all interest to become due on same; and as ancillary to such declaration we direct an account of the interest paid by the plaintiff on the said sum of £100 and payment of the amount found to be due.

One of the first duties of a solicitor towards his client is to render true and accurate accounts, and such accounts should be of the highest standard of clarity and intelligibility. The accounts in this case are not so clear and intelligible that they can be readily understood by a lay client and they have been challenged in several particulars. They may have to be recast as a result of our order and therefore there must be a general account of all monies received and paid by the defendant as solicitor and agent for the plaintiff in the purchase and mortgage of the dwelling house and premises. The plaintiff's counsel recognising that in view of the relief granted at items (a), (b) and (c) in the Statement of Claim, no claim for further damages for negligence was sustainable expressly abandoned any such claim. The judgment of Megaw, J., will be reversed and the defendant will pay the plaintiff's costs of the action and of this appeal. The costs of taking the accounts will be in the discretion of Megaw, J., with liberty to the parties to apply to him as occasion may require.

Solicitors for the appellant: *Hamill, Davison & Wilson.*

Solicitor for the respondent: *W. H. M. Brownlee.*

M.V.P.

MINISTRY OF FINANCE

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Nov. 24.

Charity—Cy-pres scheme—Jurisdiction of Ministry of Finance—Charitable Donations and Bequest Act (Ireland), 1871 (34 & 35 Vict., cap. 102), sec. 6—Ministries of Northern Ireland Act, 1921 [N.I.] (12 Geo. 5, cap. 6), section 1.

Property was held on certain charitable trusts which eventually failed and it was impracticable to apply the same according to the direction or intention of the donor or donors. At the date of the failure the value of the trust funds exceeded £300, and the annual income did not exceed £30. By the Charitable Donations and Bequests Act (Ireland), 1871, sec. 6, it is provided that “whenever there shall be any charitable donation or bequest not exceeding in amount the sum of three hundred pounds, or in any case in which there shall be payable for any charitable or pious purposes any annual sum not exceeding thirty pounds, and it shall be found unlawful or impracticable to apply the same according to the direction or intention of the donor or donors,” the Commissioners of Charitable Donations and Bequests may apply the same *cy-pres*. The powers of the Commissioners of Charitable Donations and Bequests were vested in the plaintiffs by the Ministries of Northern Ireland Act, 1921 (N.I.).

Held, that the Ministry of Finance had power to frame a Scheme for the application of the trust fund.

ORIGINATING SUMMONS.

In 1876 certain property was given upon trust to apply the income for the benefit of S. National School in certain specified ways, provided that the school should for the future be conducted in connection with the Board of National Education in Ireland.

In 1935, the plaintiffs consented to take over and administer the trusts pursuant to the powers vested in the Commissioners of Charitable Donations by section nine, Charitable Donations and Bequests Act (Ireland), 1867, as amended by section one, Ministries of Northern Ireland Act, 1921 [N.I.] and the Schedule to that Act, and the funds representing the trust property were transferred to the plaintiffs.

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The annual income of the trust funds was regularly expended for the benefit of S. School until 28th July, 1940, when the school was closed by the County Down Regional Education Committee under their statutory powers.

The capital value of the trust funds amounted to £361 7s. 6d.; the annual income amounted to £12 13s. 0d.

The summons was brought by the plaintiffs for the determination of the question whether a scheme ought to be directed providing that the property and funds should be applied *cy-pres*, and, if so, whether the plaintiffs had power or jurisdiction to frame such a scheme.

M. W. Gibson for the plaintiffs.

MacDermott, A-G. (*Dougherty* with him) for the defendant.

MEGAW, J. : MEGAW, J. : The interpretation of section six of the Charitable Donations and Bequests Act (Ireland), 1871, presents an interesting question which is not covered by any judicial authority. It gives the Ministry power to frame a scheme *cy-pres* where either the capital sum does not exceed £300 or the annual sum does not exceed £30. Here there is a capital sum which exceeds £300, but the income therefrom is now less than £30 per annum. In view of the fact that the capital sum exceeds £300, can I consider the annual income and, on the basis of its amount, determine that the case is within the jurisdiction of the Ministry? The solution depends on the proper meaning of "annual sum" in the section. If it is to be taken in the widest sense—its ordinary sense of a dividend or rent or any sum annually available for the trust purposes—then, as the section provides a clear alternative, the amount of the capital fund becomes an irrelevant consideration in the case before me. If, on the other hand, it is intended to apply only to cases where there is a capital fund with which it can be linked, then as the capital sum is over £300,

the Ministry would have no jurisdiction in the present case.

The Attorney-General has referred me to various other sections of the Act of 1871, notably sections seven, eight, nine, eleven and twelve, where the income or other annual amount available for the charitable purposes are referred to. There seems to be no uniformity in the terminology, and a comparison of these sections has afforded me little or no assistance.

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Section six of the Act of 1871 repealed section seven of the Act of 1867 which conferred jurisdiction on the Commissioners where there was a charitable donation or bequest not exceeding in amount the sum of £100 or the income of any charity the gross annual value of which did not exceed £10. Section six of the Act of 1871 was designed to extend the jurisdiction of the Commissioners at least so far as amount was concerned.

The word "income" in the Act of 1867 was changed to "annual sum" in the later Act. "Annual sum" possibly was intended to have a wider significance than "income" and must be understood to include income, unless there is something in the Act which would require that it should have a narrower meaning. The purpose of the section seems to me to have been to extend the jurisdiction of the Commissioners and not to impose a limitation on the jurisdiction which clearly existed under the former Act, and in my opinion exists as clearly under this Act if words are taken in their natural sense.

Had the legislature intended to restrict the meaning of "annual sum" to confine it to income from a capital sum it would have expressed itself more specifically, say, by the use of the word "and" instead of "or."

The method in which such jurisdiction should be exercised is another matter, and great care must be taken that the principles which are applicable by Courts of Equity in *cy-pres* cases should be rigidly observed.

I direct that a scheme be prepared by the Ministry

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of Finance for the application *cy-pres* of the funds the
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Solicitor for Ministry of Finance: *F. C. MacNeice.*
Solicitor for the Attorney-General: *Robert Watts.*

M.W.G.

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Husband and Wife—Nullity of marriage—Cohabitation and non-consummation—Shortness of cohabitation—Failure to submit to inspection—Inference of impotence or wilful refusal.

May 12.
June 9.

The parties were married on 9th July, 1941; they had been engaged to be married for four years during which time the respondent on more than one occasion evinced a reluctance to marry. They cohabited until 6th August, and again from 22nd August until the last week in September. Between 9th July and 6th August and between 23rd August and 5th September the respondent made repeated attempts to consummate the marriage all of which were unsuccessful; he made no subsequent attempt to do so. In the last week in September the respondent on his own initiative ceased to occupy the same bedroom as the petitioner, and she thereupon went to her mother's house where she since remained. The respondent often told the petitioner that he was not sexually inclined. He did not submit himself for medical examination. The respondent did not file an answer; neither did he appear nor was he represented at the hearing.

Held that the petitioner was entitled to a decree of nullity of marriage.

The facts appear in the judgment.

Warnock, K.C. (with him *Curran* serving with His Majesty's Forces) for the petitioner:—

The law is correctly stated in *Latey on Divorce* page 180 (1940 ed.) in these words: "If in a nullity suit, a respondent now refuses to submit to treatment or medical examination, he or she will be deemed to be incurably impotent, on adequate proof and in the absence of evidence to the contrary. It is no longer necessary to allege that the impediment is 'incurable by art or skill.'"

In *A. B. v. C. B.* (1), an action by a husband against a wife, for declaration of nullity of marriage on the ground of the wife's impotence, it was proved that the marriage had been solemnised seven months before action was brought, that the parties lived together

(1) [1906] 8 F. 603.

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for three and a half months after the date of the marriage and then separated ; that the marriage never was consummated ; that there was no structural incapacity on the part of the wife, and that the husband was able and anxious to consummate, had ample opportunities, and, short of physical force, adopted all ordinary expedients to induce the wife to admit connection. No reason was suggested for a wilful refusal on the part of the wife, and it was found that the whole probabilities of the case pointed to an opposite conclusion, and it was held that in the circumstances of the case, the Court was entitled to draw the inference that there was a practical incapacity on the part of the wife, and decree of nullity granted.

In *G.—s. v. T.—e.* (1), decree of nullity of marriage by reason of impotence was pronounced after a cohabitation of three months only.

In *W. v. W. (otherwise L.)* (2), it was held that although the parties to a ceremony of marriage may have never since the date of the marriage lived under the same roof, it is competent to the Court, if satisfied of the *bona fides* of the suit, to infer, from the wilful and wrongful refusal of the one party (in that case the wife) to live with the other, coupled with the further refusal of the same party to submit to medical inspection, that there is some impediment to consummation, and to pronounce a decree *nisi* for nullity of marriage at the suit of the party wronged.

In *B. (otherwise H.) v. B.* (3), it was held that from the fact of non-consummation of a marriage after a reasonable period of cohabitation during which one of the parties was always willing and anxious and repeatedly urged that the marriage should be consummated, the Court may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, and has also refused to obey the usual order to attend for medical inspection. In such a case, the Court may properly assume the existence of some latent impedi-

(1) 1 Sp. Ecc. & Ad. 389.

(3) [1901] P. 39.

(2) [1912] P. 78.

ment amounting to incapacity. The principle laid down by Jeune, P., in *F. v. P. (falsely called F.)* (1), in the case of a female respondent, that from the fact of non-consummation of a marriage after a reasonable period of cohabitation, during which one of the parties was always willing and anxious and repeatedly urged that the marriage should be consummated, the Court may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, and has also refused to obey the usual order to attend for medical inspection, was followed in *B. (otherwise H.) v. B.* (2), and extended to the case of a male respondent.

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In *W. v. S. (otherwise W.)* (3), where there had been an entire absence of cohabitation, incapacity to consummate on the part of the wife was found as a fact, on positive evidence arising from a statement made by herself, taken in conjunction with the general facts of the case and her refusal to submit to medical inspection.

We submit that the period of cohabitation in the present case has been sufficient, and that this must be coupled with the fact that the respondent has refused to permit inspection.

[He also referred to *Napier v. Napier* (4).]

There was no appearance for the respondent.

Cur. adv. vult.

ANDREWS, L.C.J.: This is a wife's petition for nullity on the ground of impotence and, alternatively, on the ground of non-consummation owing to the wilful refusal of the respondent to consummate the marriage. Though a general appearance was entered to the petition, no answer was filed; and the respondent neither appeared nor was he represented at the trial.

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The marriage of the parties was solemnized on 9th July, 1941, after a four years' engagement during which

(1) 75 L.T. 192.

(3) [1905] P. 231.

(2) [1901] P. 39.

(4) [1915] P. 65.

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the respondent had on more than one occasion evinced a reluctance to get married. The honeymoon, which lasted for a week, was spent in Co. Wicklow; and during this period the respondent made several unsuccessful attempts to consummate the marriage. From their return on 17th July until 6th August the respondent and his wife continued to cohabit, but all attempts to have complete connection failed. Reduced, as she says, to a state of nervous tension, the petitioner went away to Cookstown "to reflect." She returned on 22nd August, and on the following day went with the respondent to Dublin for the week-end. During this time he made no attempt to have intercourse, but further attempts which the respondent made between the 23rd August and 5th September proved equally ineffective. The parties then left on a ten days' visit to Portsalon, but neither then nor at any time subsequently was any further attempt made to consummate the marriage. Indeed, during the last week in September the respondent went on his own initiative to a separate room; and, obviously, in a state of despair and of considerable nerve strain—her own words were that she was "terribly upset"—the petitioner left her home and went to her mother's house on the opposite side of the road where she has since remained. During this period the respondent has made no proposal for the resumption of cohabitation. Indeed, neither party has even spoken to the other.

I accept without hesitation the evidence of the petitioner that she was at all times willing and anxious that the marriage should be consummated; that she never resisted or obstructed the respondent, but, on the contrary, encouraged him in every way she could. Concerned lest she might be in any way responsible for the failure to consummate she went to see the eminent specialist, Dr. Hardy Greer. It was not found necessary to call Dr. Greer as a witness in view of the Medical Inspectors' report which stated that the petitioner was a virgin and had no impediment on her part to prevent the consummation of the marriage, and also the evidence of one of the Inspectors, Dr. McAfee, who assured me that the petitioner was

perfectly normal, and that he could see nothing, physically or otherwise, to account for the non-consummation of the marriage. Upon this latter point—non-consummation—he had no doubt whatever.

The order for inspection had, as is customary, been made in regard to both parties, but the respondent failed to submit himself to examination ; and this fact may well be coupled with the petitioner's evidence that the respondent had often said to her that he was not sexually inclined.

The only difficulty which presents itself on the facts proved before me is the shortness of time during which the parties cohabited, and the limited number of attempts towards consummation. This difficulty was appreciated and faced by Mr. Warnock, who cited to me at some length the majority of the relevant authorities from *N. v. M.* (1) to *Napier v. Napier* (2). It would be idle for me to review these cases at length, especially as many of them relate to the issue of wilful refusal, which, when the cases were decided, was not in itself a ground on which nullity could be declared. Some of the propositions which they establish may, however, be referred to. Thus, the old rule of the Ecclesiastical Courts founded on the Canon law, which in cases of presumption of impotence required a triennial cohabitation, has long since ceased to be applied. Even when *N. v. M.* (1) was decided in the year 1853, Dr. Lushington expressed the rule in the modified form that there should be "a cohabitation "of so long an endurance that if the man were potent "and in good health no temporary impediment could "have prevented consummation, according to all "reasoning and experience of which the subject "admits." Our Courts in these days look not for a rigid and inflexible period of time, but rather to see if there has been a facility or opportunity for consummation for what, in all the circumstances of the case, may be regarded as an adequate period of time—a time sufficient to overcome temporary impediments. Thus, in *F. v. P.* (3)—a case in which the husband was

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(1) 2 Rob. Ecc. 625.

(3) 75 L.T. 192.

(2) [1915] P. 65.

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petitioner—Sir Francis Jeune said that if it be satisfactorily proved that repeated endeavours of a potent husband who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife. The principle so laid down in the case of a female respondent was subsequently followed and extended by Gorell Barnes, J., to the case of a male respondent in *B. v. B.* (1).

Cases can be cited in which relief has been granted though the time was comparatively short. Thus, in *A. B. v. C. B.* (2), the marriage had been solemnized seven months before action and the parties had lived together for only one half of that period. Again, in *G. v. T.* (3), three months' cohabitation was on the facts of the case regarded as sufficient. In *E. v. E.* (4), the period was six months. At the same time I do not hesitate to say that if there were no other facts in this case I would have considerable difficulty in holding that the time and opportunity test had been sufficiently complied with to entitle the petitioner to a decree. There are, however, other important circumstances to which I have referred in my statement of the facts, and in my opinion these provide a background or setting for the case which greatly facilitate the drawing of an inference in regard to the husband's impotence. The reluctance after engagement to get married, the desistance after a comparatively short period from further effort, the withdrawal to a separate bedroom, the confessed disinclination towards sexual matters, and the failure to present himself for medical examination—these are all circumstances which may properly be relied upon by the Court. No one of these facts might in itself suffice, but taken collectively, and in conjunction with the direct evidence of attempts and failures, the conclusion is in my opinion irresistible that the failure to consummate the marriage rests with the respondent. I therefore declare the petitioner

(1) [1901] P. 39.
(2) 8 *Frazer* 603.

(3) 1 *Sp. Ecc. & Ad.* 389.
(4) 87 *L.T.* 149.

entitled to a decree of nullity of her marriage with the respondent with costs, such costs not to include any costs of 21st April, 1942, when an adjournment of the hearing was granted at the request of the petitioner.

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Perhaps I should add that, had the respondent submitted himself to medical examination, and had such examination shown that he was apparently without physical defect, it might have been possible to have based the decree upon the *quoad hanc* doctrine, for which the judgment of Lord Birkenhead, L.C., in *C. v. C.* (1), provides ample authority. In the absence of such examination the respondent in this case cannot have the benefit of any such limitation.

Solicitors for the petitioner: *Hamill, Davison & Wilson.*

J. McC.

(1) [1921] P. 399.

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**EMPLOYEES OF MURRAY, SONS & COMPANY, LIMITED
v. MURRAY, SONS & COMPANY, LIMITED.**

Mar. 3, 4, 29.

Reference to Trade Board to fix minimum rates of wages—Trade dispute—Reference to National Arbitration Tribunal (Northern Ireland)—Writ of Prohibition—The Defence (General) Regulations, 1939, Regulation 58AA (S. R. & O. 1940, No. 1217)—Conditions of Employment and National Arbitration Order (Northern Ireland), 1940 (S. R. & O. 1940, No. 1508 (N.I.).)

While the determination of minimum rates of wages in the tobacco trade in Northern Ireland was under consideration by the Tobacco Trade Board of Northern Ireland a dispute arose between Murray, Sons & Co., Ltd., tobacco manufacturers, and their employees as to rates of wages payable. The trade union of which the employees were members applied on behalf of the employees to the Minister of Labour for Northern Ireland under Article 2 of the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, to have the dispute settled by the National Arbitration Tribunal (Northern Ireland) and the Tribunal was convened accordingly. The Company sought by a Writ of Prohibition to restrain the members of the Tribunal from proceeding further in the matter.

Held, by the King's Bench Division (Andrews, L.C.J., and Megaw, J.), that the reference to the National Arbitration Tribunal was proper and was not affected by the existing reference to the Trade Board, and that the application for a Writ of Prohibition should be refused.

APPLICATION FOR WRIT OF PROHIBITION.

The facts are stated in the judgment of Andrews, L.C.J.

The grounds upon which the Company applied for the Writ of Prohibition were as follows :—

- (a) That the jurisdiction of the National Arbitration Tribunal is confined to settling disputes which cannot otherwise be determined.
- (b) That the power of the Ministry of Labour for Northern Ireland under Regulation 58AA of the Defence (General) Regulations, 1939, does not extend to creating a Tribunal with jurisdiction over matters in respect of which jurisdiction is

given to a Trade Board under the Trade Boards Act (Northern Ireland), 1923.

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- (c) That the National Arbitration Tribunal has no jurisdiction to make awards at variance with the Orders fixing minimum rates of wages under the Trade Boards Act (Northern Ireland), 1923.

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Warnock, K.C., and Patton for the applicant Company:—

The reference of a trade dispute to the Tribunal under the Order can only be made when the dispute cannot otherwise be determined—Art. 1. It is a condition precedent to invoking the Tribunal that suitable means of settling the dispute do not exist—Art. 3. The words “if not otherwise determined” in Art. 2 must be read in conjunction with the wording of Art. 1, viz., “which cannot otherwise be “determined” and must mean “which could not and “therefore has not been otherwise determined.”

Though the present dispute is between the Company and their employees it is in effect a dispute relating to minimum wages, having regard to the fact that Gallahers Limited have already agreed to pay higher wages. The War Emergency Payment does not affect the issue, because the letter of Mr. Leeburn, dated 31st July, 1942, which contained the workers' new demands makes no reference to it. The dispute relates solely to rates of wages. There is a body constituted for fixing minimum wages, viz., the Trade Board. The Trade Union recognised this by referring the dispute to the Trade Board on 22nd June. There is before the Trade Board at this moment an application by Mr. Leeburn which may be relisted at any time. When the Board adjourned there was no finality in the matter. The proposals had to be approved by the workers employed by Gallahers Limited. Had they not approved the application would have been relisted before the Trade Board. A decision in favour of the Ministry in this matter would take away almost all the jurisdiction of the Trade Boards. The jurisdiction of the Industrial Courts is specifically retained by

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Regulation 58AA (3). The legislature did not intend the Tribunal to be the only means of settling disputes. It has no jurisdiction where suitable means of settling the dispute exist "by virtue of the provisions of any "agreement." *A fortiori* it has no jurisdiction where suitable means exist under statute, viz., the Trade Board.

MacDermott, A.-G., and Belford for the Ministry of Labour for Northern Ireland:—

The whole issue resolves itself into the net question : is there a trade dispute within the terms of the Order of 1940 ? If so, it follows that there is a general power to settle it and the Ministry was within its powers in referring the dispute to the Tribunal. The Trade Board is not a suitable or competent body for the purpose of determining the dispute between the parties, because it has no machinery for determining disputes. The real function of the Trade Board is to determine a datum level below which wages in the trade shall not fall. It is a mere accident that the Company pays the minimum wage and that the fixing of their wage rate is tantamount to fixing the minimum rates. But this does not add to the jurisdiction of the Trade Board. If the settlement had been with the Company and not with Gallahers Ltd., then the application could not have come before the Trade Board. The dispute, if any, existing at the time of the application was of a different kind from the present dispute which arose out of the correspondence beginning 31st July. The claim is now no longer for a minimum rate of wage, but for an actual increase of the wages of the members of the Union. That claim could not have been made to the Trade Board.

The whole object of the Order of 1940 is to give a speedy method of settling disputes. Its terms are overriding in the sense that the Tribunal has jurisdiction once a trade dispute has been referred to it by the Ministry irrespective of the existence of any concurrent jurisdiction. When the Order is read as a whole the phrase "which cannot otherwise be

"determined" in Art. 1 is shown to imply the modification "as hereinafter contemplated by this Order."

The word "agreement" in Art. 2 (2) does not include a statutory body. The Tribunal specifically overrides former legislative bodies—Emergency Powers (Defence) Act, 1939, section 1 (4). In order to preserve the jurisdiction of the Industrial Courts it was necessary to make express provision—Regulation 58AA (3). There is no saving clause in the case of Trade Boards.

Once there is in existence a dispute which does not fall within the machinery of Art. 2 (2) then the Ministry has a clear right to refer the dispute to the Tribunal under Art. 2 (3).

[They referred to *National Association of Local Government Officers v. Bolton Corporation* (1).]

Fox, K.C., and *M. W. Gibson*, for *W. J. Leeburn*, Organising Secretary of the Amalgamated Transport and General Workers Union :—

Warnock, K.C., replied :—

Cur. adv. vult.

ANDREWS, L.C.J. : This is an application made (pursuant to leave granted by my order of 16th October last) on behalf of Messrs. Murray, Sons & Co. Ltd. (in this judgment hereinafter referred to as "the Company") for an order that a Writ of Prohibition do issue directed to the appointed members of the National Arbitration Tribunal (Northern Ireland) (hereinafter referred to as "the Tribunal") prohibiting them from further proceeding in the arbitration or settlement of an alleged trade dispute between the employees of the Company and the Company which was referred to the Tribunal by the Ministry of Labour for Northern Ireland under a reference made on or about 9th September, 1942. When I have first stated the relevant facts the grounds upon which the Company rely in support of their application will be more clearly understood and more fully appreciated.

The matter had its inception in a letter written on 22nd June, 1942, by Mr. W. J. Leeburn, District

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Organiser of the Amalgamated Transport and General Workers' Union, to the Secretary of the Tobacco Trade Board of Northern Ireland applying for certain specified changes in existing rates and War Emergency Payment for both male and female workers. The prompt consideration of the Department was sought in order that a meeting of the Tobacco Trade Board might be held at an early date to discuss the same. On 28th July, 1942, the Board met to consider the application; and in the course of the proceedings an intimation was made by the representatives of Messrs. Gallaher Ltd., who are the largest employers in the Tobacco Trade in Northern Ireland, that they were prepared to make an offer on behalf of that firm to their employees. Negotiations thereupon took place in private, and a definite offer of increased rates of wages and of an amendment in the War Emergency Payment was made, which the representatives of the workers agreed to recommend the employees of Messrs. Gallaher Ltd. to accept. The representatives of the Company were not, however, prepared to make any similar offer; and, on the members of the Trade Board returning to the Board Room, the meeting was, on the application of the workers' representatives, adjourned *sine die* without dissent. The offer of Messrs. Gallaher Ltd. was finally accepted at a meeting of the Tobacco Branch of the Union on 30th July; and Mr. Leeburn was at the same meeting instructed to apply to the Company for increases in wage rates similar to those granted by Messrs. Gallaher Ltd.

The next step taken was, accordingly, a letter addressed by Mr. Leeburn to the Company on 31st July, 1942, applying for certain changes in wage rates therein mentioned to operate as from 6th August, 1942. The scales set out in this letter were not the same as those contained in the letter to the Secretary of the Tobacco Trade Board of 22nd June, 1942. In most cases the amounts demanded were higher; and workers under the age of 21 years were classified according to whole years of age and not half years as in the June application. Furthermore the second application made no demand for an amend-

ment of the War Emergency Payment Agreement, which had been in operation since February, 1940, the payments under which were based on the cost of living index figure and were in no way related to or dependent upon the minimum rates of wages fixed by the Trade Board.

To this letter the Company replied on 4th August referring to the earlier proceedings, and intimating that the application which they had received was "in effect the same as the application submitted to "the Tobacco Trade Board." They further stated that as the rates of wages then in force were fixed by the Tobacco Trade Board they thought that any proposal to vary them should be submitted to the Board. On 6th August Mr. Leeburn replied repudiating the suggestion that the application of 31st July was a reiteration of the claim before the Trade Board, and asserting that it was a completely different application based on the result of the negotiations with Messrs. Gallaher Ltd., and that it took into consideration the differential which existed between rates paid by the two firms prior to this last adjustment. The letter concluded with the assertion that the Union had the right to take the course of action it had taken, and that, unless an agreement was arrived at satisfactory to their members in the employment of the Company, he—Mr. Leeburn—would be compelled to report to the Ministry of Labour that a dispute existed between the Company and the Union.

The reference in this letter to "the differential" which had existed between rates paid by Messrs. Gallaher Ltd. and the Company calls for brief explanation. Of a total of about 3,275 workers in the Tobacco Trade in Northern Ireland approximately 2,750 are employed by Messrs. Gallaher Ltd. and 500 by the Company, leaving only about 25 workers for employment in three other small firms which carry on business in Newry, Belfast and Londonderry, respectively. On a previous application minimum rates of wages were fixed by the Trade Board for the industry in Northern Ireland, and these were duly confirmed by order of the Ministry of Labour under section 9 of the Trade

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Boards Act (Northern Ireland), 1923. Messrs. Gallaher Ltd. have, however, always paid to their employees somewhat higher wages than those fixed as minimum rates by the Trade Board, which accounts for "the differential" referred to in Mr. Leeburn's letter. In this respect Messrs. Gallaher's action is, we are informed, precisely similar in character to that of the Imperial Tobacco Co. Ltd., in England. As indicated in Mr. Leeburn's letter of 31st July the scales of pay therein specified took into consideration and preserved this differential.

On 11th August Mr. Leeburn was instructed at a monthly meeting of the workers engaged in the Tobacco Trade in Northern Ireland to notify the Ministry of Labour of the existence of a trade dispute between the Company and their workers; and this was duly done by a letter of 14th August which contained a specific request that the dispute be referred to the Tribunal to be heard by them as soon as possible in the event of no settlement being reached during the intervening period. Meanwhile, however, a further letter was written by the Company to Mr. Leeburn on 11th August, in which they reviewed the whole matter, and reiterated their opinion that it should be dealt with by the Trade Board. On 18th August the Ministry informed the Company that the Union had notified the Department that an application for an increase in the wages of members of the Union employed by the Company had been rejected, and that the Union had asked that the matter should be treated as a "trade dispute" with a view to the case being referred for settlement to the Tribunal. The Department, accordingly, asked to be favoured with the Company's observations. The Company's reply of 20th August once again restated the facts, and maintained that if the rate of wages to their workers was increased it was tantamount to an increase in the minimum rates in Northern Ireland, and that in their opinion any demand for a variation of rates ought to be submitted to the Trade Board. The Ministry was not satisfied with this reply, and on 9th September wrote to the Company informing them that it had referred the

matter for settlement to the Tribunal in accordance with the Conditions of Employment and National Arbitration Order, 1940. Six days later the Secretary of the Tribunal informed the Company by letter that it was hoped to be able to arrange for the dispute to be heard by the Tribunal at an early date. It is this reference of the dispute to the Tribunal which is challenged in the present proceedings.

Before considering the arguments addressed to us it seems desirable to refer to the statutory authority of the Trade Board and of the Tribunal respectively. Trade Boards were first constituted under the Trade Boards Act, 1909. The provisions of this Act need not, however, be specially examined, as both it and the amending Act of 1918 were repealed to the extent to which they were in force in Northern Ireland by section 27 of the Trade Boards Act (Northern Ireland), 1923—a consolidating and amending Act—under which Trade Boards were empowered to fix minimum rates of wages to apply respectively to men, women and juvenile workers. These minimum rates might be fixed either so as to apply generally to the trade, or to any special process in the work of the trade, or to any special area, or to any class of workers in the trade, or to any class of workers in any special process or in any special area. The industries in which Trade Boards were established by the Act or authorised to be established by Provisional Order thereunder were those in which the rate of wages prevailing in any branch of the trade was unduly low as compared with the rates in other employments, regard being had also to the degree of organisation in the trade (sec. 1 (1)). In other words, as popularly expressed, they were established to deal with sweated conditions of employment. A Trade Board for any trade must consider, as occasion requires, any matter arising under the Act which is referred to them by the Ministry of Labour for Northern Ireland and make a report thereon to the Ministry (sec. 4). Before fixing, cancelling or varying any minimum rate of wages the Trade Board must give notice of the rate which they propose to fix or of their proposal to cancel the rate, or of the proposed

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Subsequent Trade Board legislation embraces the Holidays with Pay Act (Northern Ireland), 1938, and the Trade Boards Act (Northern Ireland), 1939, the provisions of which are immaterial for our present enquiry.

It was in these circumstances that an Order in Council (1940 No. 1217) was passed on 10th July, 1940, in pursuance of the Emergency Powers (Defence) Acts, 1939 and 1940, amending and adding to previous Regulations which had been made in the year 1939. A new Regulation 58AA provided in relation to Northern Ireland that, with a view to preventing work being interrupted by trade disputes, the Ministry of Labour for Northern Ireland might by order make provision (*inter alia*) (a) for establishing a tribunal for the settlement of trade disputes and for regulating the procedure of the tribunal; and (b) for prohibiting, subject to the provisions of the order, a strike or lock out in connection with any trade dispute.

Pursuant to the powers thus vested in it by Regulation 58AA the Ministry of Labour for Northern Ireland made an order 1940 No. 1508 called Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, with a view, as therein stated, to preventing work being interrupted by trade disputes. By Article 1 of this order the Tribunal was constituted "for the purpose of settling trade disputes which "cannot otherwise be determined." Article 2 (1)

provides that if any trade dispute exists or is apprehended, that dispute, if not otherwise determined, may be reported to the Ministry by or on behalf of either party to the dispute. By Article 2 (2) if in the opinion of the Ministry suitable means for settling the dispute already exist by virtue of the provisions of any agreement to which the parties are organisations representative of employers and workers respectively, the Ministry shall refer the matter for settlement in accordance with those provisions. This article is, as it will be observed, mandatory in character, but it only applies to cases where suitable means for settling the dispute already exist by virtue of such agreement as is therein referred to. In my opinion it has no application to the present case in which there is neither any such agreement as is referred to, nor, in consequence, are there any suitable means for settling the dispute already in existence.

There follows Article 2 (3) which provides that, where in the opinion of the Ministry no such suitable means of settlement exist, the Ministry shall take any steps which seem to it expedient to promote a settlement of the dispute, and may, if it thinks fit, refer the matter for settlement to the Tribunal. It is under this paragraph of the Article that the reference was made which is challenged by the Company in the present case. In my opinion it was both an authorised and appropriate reference as no voluntary means of settlement existed. The importance attached to the jurisdiction of the Tribunal is evidenced by paragraph (4) of Article 2 under which, where the steps taken to promote a settlement under paragraph (2) or paragraph (3) (otherwise than by reference to the Tribunal) have not resulted in a prompt settlement, it is, subject as therein provided, made mandatory upon the Ministry to refer the dispute for settlement to the Tribunal.

The object and underlying principle of the order as a wartime measure is further apparent from Article 4 which prohibits lock-outs and strikes in connection with any trade dispute unless the dispute has been reported to the Ministry and 21 days have elapsed

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without the dispute being referred in accordance with the provisions of Article 2.

Mr. Warnock's argument on behalf of the Company, briefly expressed, was as follows:—He contended that the dispute related solely to wages; that there was in existence under the Trade Boards Acts a statutory scheme for fixing wages, which the Union had always hitherto recognised; and that before a reference could be made to the Tribunal it must be shown that the trade dispute was one which could not otherwise be determined than through the Tribunal. He submitted that the Company had always previously paid the minimum Trade Board rates; and that, as Gallaher Limited had already been settled with, and as there were only some 25 other employees in the trade in Northern Ireland, this application which the Ministry had referred to the Tribunal was "in effect" or "in substance" to fix minimum trade rates. It will be remembered that this latter point was made by the Company when in their letter of 20th August they said that if the rate of wages to their workers was increased it would be "tantamount to" an increase in the minimum rates in Northern Ireland.

I am unable to accept this argument either in whole or in part. In the first place the existence of what Mr. Warnock designates as a "statutory scheme" is not in my opinion such an "agreement" as is referred to in Article 2, paragraph (2), of Order 1940 No. 1508. Again, the demand made on 31st July, which resulted in a trade dispute and was referred to the Tribunal, was not either in substance or in form for a minimum Trade Board wage. It related solely to the actual wages which should be payable by a particular firm—"the Company"—to their own employees—something which was in my opinion wholly different from a demand for a minimum wage for the whole industry. It is not the function or within the competency of the Trade Board to determine a dispute between an individual firm and its employees. The use of such words as "in effect" or "tantamount to" cannot make the character of the demand different from what it really was. Finally, I cannot agree with Mr.

Warnock when he contended that a decision in this matter by the Tribunal would take away the jurisdiction of the Trade Board and for all practical purposes do away with the Trade Boards Act. The "mere accident," as the Attorney-General described it, that the Company always paid the minimum rate of wage cannot transform a demand for a specific wage to be paid by a particular firm into a demand for a minimum rate for the industry. Further, this demand, when not agreed to, resulted in a trade dispute which could not be determined by the Tobacco Trade Board or "otherwise" as provided by Article 1 of S. R. & O. 1940 No. 1508. The Trade Board would have had no jurisdiction in the matter. They fix general rates; those rates are minimum rates; and they are fixed in or for their trade without any power to discriminate among individual firms or employees in the trade.

Mr. Warnock further relied upon the fact that as the original application to the Trade Board had been adjourned *sine die*, and must therefore be taken to be still pending, it was wrong for the Ministry of Labour "to by-pass" the Trade Board, and further that it was impossible in the circumstances to say that the dispute "could not otherwise be determined." I have already pointed out that the dispute which has been referred to the Tribunal is essentially different in character from the application which was made to the Trade Board; but, quite apart from this, I would wish to make it clear that within the terms of the Order 1940 No. 1508 the discretion lies with the Ministry; and this discretion should not in my opinion be controlled by this Court, by the issue of a Writ of Prohibition or otherwise, provided the Court is satisfied, as we are, that jurisdiction existed for the course which was taken, and that the discretion was not clearly exercised *mala fide* or from some wrong or improper motive. When the Court is satisfied upon these matters the writ does not lie to limit discretion or test the correctness of a decision. "Prohibition," as Lord Wright said in the recent case of *National Association of Local Government Officers v. Bolton Corporation* (1), "is a remedy at

(1) [1943] A.C. 166 at p. 189.

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“least generally intended to prevent an excess of
“jurisdiction, not the risk of its being erroneously
“exercised, particularly where considerations of fact
“may be material.”

One further point was made by Mr. Warnock, based upon the fact that Regulation 58AA (3) expressly provided that nothing in any order made under the regulation should affect the power to refer trade disputes or other matters for settlement or advice under the Industrial Courts Act, 1919. Upon this point I agree with the Attorney-General who contended in his reply that the necessity for this express reference in order to save the Act of 1919 only emphasises the general over-riding character or power of an order made under the Regulation.

The application must, accordingly, in my opinion be refused with costs.

MEGAW, J.

MEGAW, J. : I have had the advantage of reading the judgment of the Lord Chief Justice and agree with the conclusions which he has stated, his statement of facts and his interpretation of the statutes and statutory orders affecting the question, so that no useful purpose would be served by a restatement of them.

In his very able and informative argument Mr. Warnock was driven to rely on the contention that Order 1940 No. 1508, Article 1, governed the matter. This Article reads “For the purpose of settling trade disputes *which cannot otherwise be determined.*” He contended that these words constituted a condition precedent to the reference of the matter to an arbitration tribunal, and that in the circumstances the Ministry had no jurisdiction to refer the matter as they purported to do. He differentiated the wording of the Article from that of Article 2 where the body to decide whether suitable means existed was the Ministry. In substance his argument was that it had been established that there was a dispute which could be determined by the Trade Board and which should be determined by them especially as there had been a submission to it of a trade dispute by the representatives of the workers, and that an award by the Trade Board

"acting in the capacity of arbitrator" under Article 5 (2) (d) of the Order could deal with all necessary matters to be determined as a decision as to "minimum wage in the trade covered all." We must read Order 1508 as a whole and not stress *minutiae*. The object of the Order is to prevent interference with work from trade disputes.

Before considering Article 1 of the Order, on which Mr. Warnock relied, we must find whether there was in fact a trade dispute existing at a date before the Ministry made its reference to the Tribunal—whether such a trade dispute existed when the Trade Board met in July. I do not think this has been established. There were certain proposals brought forward at that meeting which might or might not be accepted by the parties. There may have been an "apprehended" dispute but Article 1 does not refer to apprehended trade disputes but only applies to actually existing disputes. No reference to the Trade Board has in fact been made and the appearance of Mr. Leeburn on that occasion cannot operate as an estoppel. When Article 1 is ruled out, in my opinion Article 2 comes into full operation. At the time of the reference by the Ministry there was a dispute between Messrs. Murray, Sons & Co. Ltd. and their workers or at any rate an apprehended dispute so that paragraph (3) of Article 2 is applicable and the ministry when they made the reference were fulfilling an obvious duty.

I agree with the conclusions pronounced by the Lord Chief Justice as to Mr. Warnock's argument relating to Article 2 (2) and I need not add anything to what he has said in that regard.

I agree that the application must be refused with costs.

Solicitors for Murray, Sons & Co., Ltd.: *Johns, Elliott & Johns*.

Solicitor for Ministry of Labour for Northern Ireland: *Chief Crown Solicitor*.

Solicitors for W. J. Leeburn: *J. C. W. Rea & Son*.

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Practice—Libel—Newspaper—Payment into Court—Libel Act, 1843
(6 & 7 Vict., c. 96), sec. 2.

The defendants in two consolidated actions for libel published by them in a newspaper pleaded by way of defence, in accordance with the Libel Act, 1843, sec. 2, that the libel was published without actual malice, and without gross negligence, an apology, and payment into Court by way of amends of £25 to answer the claim of one of the plaintiffs, and £100 to answer the claim of the other plaintiff. They also served notice of such payments into Court under the provisions of Order XXII., r. 1. At the trial it was found that the libel was published without actual malice but not without gross negligence, that the apology was sufficient, and that the sums paid into Court were more than sufficient to answer the respective claims.

Held (by Andrews, L.C.J.), that notwithstanding the failure of the defendants on the defence under the Libel Act, 1843, sec. 2, they were entitled to avail themselves of the payments into Court as having been made under Order XXII., r. 1, and were therefore entitled to judgment.

TRIAL of two actions for libel which had been consolidated and ordered to be tried as one action with separate issues as to damages.

The libel complained of was published by the defendants in a newspaper their property.

The defendants pleaded by way of defence, in accordance with the Libel Act, 1843, sec. 2, that the libel was published without actual malice and without gross negligence, an apology and payment into Court of £100 to answer the claim of the plaintiff Bell, and £25 to answer the claim of the other plaintiff, and served notice on the solicitor for the plaintiffs in accordance with the provisions of Order XXII., r. 1, of the Rules of the Supreme Court. The case was tried by Andrews, L.C.J., who decided that the libel was published without actual malice but not without gross negligence, and that the apology was sufficient, and assessed the damages in the case of the plaintiff Bell at £50, and in the case of the other plaintiff at £20.

Fox, K.C., and McSparran for the plaintiffs :—

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The defendants have failed on their defence under the Libel Act, 1843, and the plaintiffs are entitled to judgment. *Oxley v. Wilkes* (1), *Sley v. Tillotson* (2).

[They referred to *Fraser on Libel and Slander* (7th ed.), p. 255.]

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Chambers, K.C., and Hanna for the defendants :—

Oxley v. Wilkes (1), and *Sley v. Tillotson* (2) were decided when money could not be lodged in Court with a denial of liability in a libel action. The law is correctly stated in *Halsbury's Laws of England* (Hailsham ed.), vol. 20, par. 641.

ANDREWS, L.C.J. : The plaintiff, James Gawn, is a widower who resides at Knockahollet, Cloughmills, Co. Antrim, where he carries on business as a grocer and farms about 44 acres of land. His wife died on 4th February, 1942, leaving one child—the only issue of some 15 years of happy married life. As his wife had largely attended to the shop and also to the needs of the child and other household duties, Gawn found the necessity after her death for obtaining the services of someone who would perform these duties, and his choice rested with his present co-plaintiff, Miss Lily Bell, a young lady, 26 years of age, who had been well known to both Gawn and his wife, and who had, indeed, stayed with them as their guest during holiday periods. She, accordingly, entered Gawn's employment at the end of March, 1942, at a wage of £3 per month.

ANDREWS,
L.C.J.

Such was her position and such were their relations as employer and employee when the *Northern Constitution*, a weekly newspaper printed and published in Coleraine, produced the copy of their paper for Saturday, 7th November, 1942. In it appeared a birth announcement in the "Births, Marriages and Deaths" column in the following terms :—

"GAWN—On 4th November, 1942, to Lily (née "Bell) wife of James Gawn, Knockahollet, Cloughmills, Co. Antrim—a son (Thomas McKay)."

(1) [1898] 2 Q.B. 56.

(2) 14 T.L.R. 545,

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The notice leaves no room for doubt that the two first-named persons were the present plaintiffs. They, accordingly, instituted separate actions for libel against the Northern Constitution, Ltd., which were subsequently consolidated and ordered to be tried as one action with separate issues as to damages.

The libellous character of the notice has not been and could not be denied; and, as Miss Bell had not been and is not yet married, she is fully justified in the innuendo which she placed upon it—that “it made her an immoral woman, and that she had been having relations with Mr. Gawn.” The innuendo assigned by Gawn was precisely the same. “I thought,” he said, “that it meant I had been immoral with Miss Bell.” In passing I would observe that neither plaintiff assigned any innuendo on the name given to the son, namely, Thomas McKay, which is the name of a man of some 32 years of age residing in the district who had been an occasional customer in the shop for cigarettes, but who, according to the evidence, was not further known to Miss Bell. In this respect the proof fell short both of the innuendo pleaded and of that alleged by Mr. Fox in his opening statement.

The story of how this birth announcement came to be published was told by William Acheson, an employee of the defendants for the past 20 years. He said that on Thursday, 5th November, 1942, he was alone in the office at lunch time when there was a telephone call between 1-0 and 1-10 p.m. He asked who was speaking, and a voice replied that it was James Gawn, of Cloughmills, wanting the insertion of a birth notice in the paper. The speaker gave the notice as published, spelling out the name of Gawn with the first letters of other names. He asked the cost of the notice, was informed that it would be 2s. 6d., and said that he would forward it by postal order that evening. In fact the money never arrived. Acheson says that it was a “cultured voice,” or, as he also described it, “a very trained voice for the occasion.” He said that he was quite sure the notice was all in order; so he made no inquiry from any one to authenticate it.

The newspaper containing the notice, though dated November 7th (a Saturday), was in fact in circulation on November 6th—the day following the telephone message ; and it was on 6th November that the Birth announcement was seen by the plaintiffs, when a copy of the paper was left by the breadman. The plaintiff Gawn's indignation was apparent from an immediate protest which he made personally by calling at the defendant's office—but whether this was, as he said, on Monday, 9th, or, as Acheson said, on Saturday, 7th, is immaterial.

Of course no attempt was made by the defendants from the beginning to justify the notice further than to state that they published it in good faith and had no reason to doubt that it was in order. On 11th November, however, a letter was written to the defendants by the plaintiffs' solicitors, on behalf of the plaintiff Gawn, requesting the defendants to let them know on or before Saturday, 14th instant, what they proposed to do regarding the libellous statement in order that their client's character and reputation in the eyes of the public might be cleared. This was followed by a letter from the same solicitors on 12th November intimating that they were then also instructed to act for Miss Bell in the matter.

In reply to these letters came a letter from the defendants stating that the birth notice had been telephoned to them by a person with a "cultured voice," and that they had no reason to doubt its authenticity ; but that, on finding that no such birth had taken place, they had taken the earliest opportunity of publishing an apology in that week's issue which they trusted would be considered adequate. The letter ended with an expression of the defendants' desire that their apologies should be conveyed to the plaintiffs, and that they should be told that the defendants acted in good faith in the matter. On 20th November the plaintiffs' solicitors wrote that they could not agree that the apology was adequate restitution, and they demanded a proper settlement. Further correspondence produced no fruitful result, and Writs of Summons were duly issued on 30th November.

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The apology referred to appeared in the issue of 14th November at the top of a column on page 3. It was headed with the word "Apology" in somewhat heavy type, and was distinctive in that the spacing was wider than in that of the general letterpress. It contained a full reference to the birth notice, and to the fact that it was telephoned to the defendants who had no reason to doubt its authenticity. Then followed the material words:—

"It now, however, appears that Mr. Gawn is a widower, and that no child was born to anyone of the names mentioned. We tender our sincere apologies to the persons mentioned for the notice published, and wish to state that we acted with good faith in the matter."

This of course was the only line that the defendants could take. They had been tricked and trapped into the publication of a notice which was cruelly conceived by the mind of a heartless enemy or by a practical joker of wholly perverted moral sense, who, if he could be found, ought to be severely punished. They had, in fact, become themselves the victims of a grievous hoax, and they had thereby become unknowingly and involuntarily the agents for the commission of a grave wrong upon the plaintiffs. Whilst, however, it is recognised by and admitted on behalf of the plaintiffs, that the defendants acted without malice, and whilst they satisfied in my opinion a further condition of section 2 of Lord Campbell's Act (Libel Act, 1843) by publishing what I hold to be, within the decided cases, a "full apology" for the libel, yet I cannot hold them blameless in the matter. It is a condition of the defence under this section—a defence expressly relied upon by the defendants in this action—that the libel was inserted in their newspaper without gross negligence. The onus of satisfying this condition—even though it involves the proof of a negative—lies upon the defendants, and they have utterly failed to prove it. At the top of the Births, Marriages and Deaths column in the issue of 7th November which contained the libel appear the words: "All such announcements must be authenticated"; yet this

birth notice was received, accepted and published without the slightest attempt to obtain any authentication. It came by telephone, and related to persons who could not have been known to the defendants; otherwise they could not have been trapped. It is sought to justify the absence of authentication or even of inquiry by reference to the supposed "cultured voice" of the sender of the notice. I do not intend to say anything disrespectful when I observe that in this rural area the so-called "cultured voice" might, as it seems to me, have rather aroused than allayed suspicion. Many avenues of inquiry were obviously open, such as police barracks, post office, clergy, and others, but none of these was availed of. No step whatever was taken to test the genuineness of the notice. It was accepted at its face value, though, as the defendants' sole witness at the trial admitted, "the announcement of a birth or marriage is a very "important matter, and it may be wrong."

Counsel were unable to cite to me any case in which, during the hundred years which have elapsed since the Act was passed, the words "gross negligence" as used in section 2 of Lord Campbell's Act have received judicial interpretation. Perhaps it is better so, as every case must depend on its own facts, and in such circumstances it would be a mistake to hamper juries unduly by hide-bound legal definition. I certainly do not propose in this case, heard by me at *nisi prius*, to endeavour to do what others have failed, or have deemed it better not to attempt to do. Suffice it for me to hold, as I unhesitatingly do, that the total failure to make any inquiry whatever with a view to the authentication of the notice amounted to gross negligence on the part of the defendants for which they must be held legally responsible. Were I to hold otherwise I should be setting a premium upon the failure to make reasonable inquiry, and no one's character would be safe.

In arriving at this conclusion I do not hesitate to say that I have been in some measure influenced by the absence from the witness-box of Mr. Bacon, the managing editor of the defendants' newspaper,

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and of witnesses from other newspapers who could have sworn, if it was the fact, that the defendants' course of conduct in this matter accorded with the general practice and usages of the Press. I am not surprised that such witnesses were not called; yet I repeat the onus under the statute lay upon the defendants.

For these reasons I am of opinion that the defendants' Defence, which was based entirely on section 2 of Lord Campbell's Act, fails.

One more point, however, remains to be considered, and it is one which is not wholly free from difficulty. Under section 2 of the amending Act of 1845 (8 & 9 Vict., c. 75) there must be a payment of money into Court by way of amends at the time that the plea under section 2 of the Act of 1843 is filed. Without such payment the plea is deemed a nullity. It was with full appreciation of this requirement that paragraph 4 was included in the Defence in the following terms :—

"The defendants bring the sums of £25 and £100 into the Court by way of amends for the injuries sustained by the plaintiffs James Gawn and Lily Bell, respectively, by the publication of the said words, and say that those sums are sufficient to satisfy the plaintiffs' respective claims in this action."

Now, as the Defence under Lord Campbell's Act fails on the ground of the defendants' gross negligence, this plea of payment into Court under the statute "by way of amends" is of no avail, and cannot be further relied upon by the defendants. But the matter does not rest here. The Defence was delivered on 9th February, 1943, and upon the same day a Notice was served by the defendants' solicitors upon the plaintiffs' solicitors in the terms following :—

"Take Notice that the defendants, Northern Constitution, Ltd., have paid into Court the sum of £125, and say that £100, part of that sum, is enough to satisfy the claim of the above-named plaintiff Lily Bell, and £25, the other part of that sum, is enough to satisfy the claim of the above-

“named plaintiff James Gawn, and admit liability thereof.”

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This notice is in the Form No. 4 Appendix B to the Rules of the Supreme Court, and is in accordance with the provisions of Or. 22, r. 1. This rule was introduced into our Supreme Court code at the time of the general revision of the Rules in 1936. Under it there is no limitation placed upon the right of a defendant in a libel action to pay into Court a sum of money in satisfaction of the claim. The rule differs in this respect from the old rule under the express terms of which the general right to pay money into Court with a defence denying liability did not apply to actions for libel. The old rule could only be availed of by a defendant in a libel action when he admitted liability. Accordingly, in *Oxley v. Wilkes and Others* (1), where the defendants in a newspaper libel case relied upon section 2 of Lord Campbell's Act and paid the sum of £5 into Court thereunder, but failed, as here, on the issue of gross negligence, it was held that the defendants, having made the payment into Court as part of a defence under Lord Campbell's Act, and having failed upon that defence, were not entitled to avail themselves of the payment into Court as being made under Order 22, r. 1. This conclusion was, however, arrived at solely because of the provisions of the rule as it was then framed, and it is no authority in favour of the plaintiff in the present case in which the Notice of 9th February, 1943, was fully authorised by the present rule. Indeed, I read the concluding portion of the judgment of A. L. Smith, L.J., as entirely favourable to the defendants in the present case owing to the change since effected in the rule.

Such also is the view expressed in the Article on Libel and Slander contributed by Lord Hewart, L.C.J., and G. F. L. Bridgman, Barrister-at-Law, to the Hailsham Edition of *Halsbury's Laws of England*, vol. 20, p. 517. “If,” say the writers of the Article, “the defendant thus pleading (i.e., under section 2 of “Lord Campbell's Act) fails to establish his defence “in respect of any of the four requirements, the defence

(1) [1898] 2 Q.B. 56,

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As against this positive view I have been referred by Mr. Fox to the doubt expressed in *Fraser on Libel and Slander*, 7th Edition, p. 255, where it is stated that in view of the difficulty of satisfying all the requirements of the defence under section 2 of Lord Campbell's Act it has not hitherto been the practice to rely upon it, "more especially as it must still be regarded as doubtful, in spite of the fact that payment into Court in actions for libel or slander may now be made with a denial of liability, how far (if at all) a payment into Court 'by way of amends' which is an integral part of this defence can be made to operate in the defendant's favour as an independent payment into Court." There may be a justification for this doubt in a case in which the money is paid into Court solely "by way of amends" under Lord Campbell's Act; but in my opinion there is no room for doubt where, as in the present case, the money also purports to have been paid in with an admission of liability under Or. 22, r. 1.

One further point, not raised by Mr. Fox, occurred to me as worthy of consideration, namely, whether two such different pleas in regard to the payment into Court necessitated a two-fold lodgment—a subject-matter, as it were, for each plea. On reflection, however, I am of opinion that such a course is no more necessary than where money is paid into Court both with and without a plea of tender. Indeed, a double lodgment in Court might be attended with the serious consequence of a double withdrawal though

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the pleas were only intended to operate alternatively. Such a result would, of course, be erroneous, as, although there are two separate defences, there is only one cause of action to be satisfied. Finally, no objection was made by the plaintiff to the lodgment either at the time it was made or subsequently; and the Notice of lodgment, with admission of liability, bears upon it the official receipt of the Bank of Ireland for the said sum of £125. I have also examined the original Request for Lodgment of money filed in the Accountant General's Office which expressly relates the lodgment both to the defence and to the admission of liability for the claim. For the reasons stated I am of opinion that this Notice and payment into Court under Or. 22, r. 1. are in order. This is, as it appears to me, a very important circumstance in connection with the case; for, having given the matter my most careful consideration, I am of opinion that in making the lodgments which they did the defendants measured their liability on a very generous scale, and I, accordingly, consider that the amounts offered should have been accepted. Indeed, in view of the fact that there was admittedly no malice on the defendants' part, that they were themselves victims of a deception practised by another, and that they made an immediate correction and apology—a circumstance which I am entitled to take into consideration in mitigation of damages wholly apart from the provisions of Lord Campbell's Act—I am unable to assess the damages at a higher figure than £20 in the case of the plaintiff James Gawn and £50 in the case of the plaintiff Lily Bell. In arriving at this conclusion I have also borne in mind the fact that the plaintiffs closed their case without producing a single witness to prove that, either before or after the apology, he or she believed that there was the slightest foundation for the suggestion of immorality on the part of the plaintiffs, or that any child had been born to the plaintiff Lily Bell. It is a reasonable inference from this that those readers to whom the names meant anything regarded the notice from the beginning as a hoax.

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There will, accordingly, be judgment in the action for the defendants who have succeeded upon their defence of payment into Court under Or. 22, r. 1. The plaintiffs will have their respective costs of action up to 9th February, 1943, the date of lodgment. As from that date if the case had been tried by a jury I might have felt compelled to give the defendants the general costs of action and the plaintiffs the costs of the issue under Lord Campbell's Act in which they succeeded. This, however, was the main issue in the case, and the task of the Taxing Master under such an order would have been an unenviable one. In all the circumstances I exercise my discretion in this non-jury case by directing that there will be no costs to either party subsequent to the payment into Court. Of the said sums of £100 and £25 which are in Court the sums of £50 and £20 will be paid out to the plaintiffs, Lily Bell and James Gawn, respectively. The balance of the moneys in Court will remain as security for, and, so far as may be necessary, to satisfy the costs which I have awarded to the plaintiffs when taxed and ascertained. The ultimate balance after payment of such costs will be paid out to the defendants.

Solicitors for the plaintiffs: *Crookshank, Leech & Babington.*

Solicitors for the defendants: *P. & J. Boyle.*

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"purposes any annual sum not exceeding thirty pounds, and it shall be found unlawful or impracticable to apply the same according to the direction or intention of the donor or donors," the Commissioners of Charitable Donations and Bequests may apply the same *cy-pres*. The powers of the Commissioners of Charitable Donations and Bequests were vested in the plaintiffs by the Ministries of Northern Ireland Act, 1921 (N.I.). *Held*, that the Ministry of Finance had power to frame a Scheme for the application of the trust fund. *Ministry of Finance v. Attorney-General for Northern Ireland.* Ch. D. 83

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as there was no evidence of negligence; he stated that he did not propose to call any evidence. The trial judge so held and entered judgment for the defendants. By consent of the parties damages were assessed at £800. *Held*, by the Court of Appeal, that there was evidence of negligence on the part of the defendants, that the defendants were not entitled to a new trial of the action, and that the plaintiff was entitled to judgment for £800. *Anderson v. Belfast Corporation*.

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to which he granted an exclusive licence to manufacture, or cause to be manufactured, in the Western Hemisphere all machinery for mechanised farming covered by his patents in the United States or any other country, in consideration of certain royalties and a share of the profits to be paid to him. The shares in this Corporation were unsaleable in the market, and owing to war conditions and the demands of Government it was practically impossible for the petitioner or anyone else to prove the value of them. The apparatus was of great utility and merit, and the petitioner had done his utmost to procure its use. *Held*, that the petitioner was entitled to an order extending the patent for the further term of two years. *In re Ferguson's Patent (No. 2).* Ch.D. 44

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See MONEYLENDER.
- 2 & 3 Geo. 6, cap. 107, sec. 6 44
See PATENT.

STATUTORY RULES AND ORDERS—

- R. S. C. (N.I.) Or. 22, rr. 1, 2 168
See PRACTICE—LIBEL.
- CONDITIONS OF EMPLOYMENT,
AND NATIONAL ARBITRATION ORDER (N.I.) 1940.
No. 1508 94
See TRADE BOARDS ACT (N.I.), 1923.

TRADE BOARDS ACT (N.I.) 1923 (13 & 14 Geo. 5, cap. 32)—*Reference to Trade Board to fix minimum rates of wages*—*Trade dispute—Reference to National Arbitration Tribunal (Northern Ireland)*—*Writ of Prohibition—The Defence (General) Regulations, 1939, Regulation 58.4A (S. R. & O. 1940, No. 1217)—Conditions of Employment and National Arbitration Order (Northern Ireland), 1940 (S. R. & O. 1940, No. 1508 (N.I.))* While the determination of minimum rates of wages in the tobacco trade in Northern Ireland was under consideration by the Tobacco Trade Board of Northern Ireland a dispute arose between Murray, Sons & Co., Ltd., tobacco manufacturers, and their employees as to rates of wages payable. The trade union of which the employees were members applied on behalf of the employees to the Minister of Labour for Northern Ireland under Article 2 of the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, to have the dispute settled by the National Arbitration Tribunal (Northern Ireland)

and the Tribunal was convened accordingly. The Company sought by a Writ of Prohibition to restrain the Minister from referring the matter to the Tribunal. *Held*, by the King's Bench Division (Andrews, L.C.J., and Megaw, J.), that the reference to the National Arbitration Tribunal was proper and was not affected by the existing reference to the Trade Board, and that the application for a Writ of Prohibition should be refused. *Employees of Murray, Sons & Co., Ltd. v. Murray, Sons & Co., Ltd.* K.B.D. 94

VALUATION—*School-house used to provide secondary education for children of parents in comparatively humble circumstances—School carried on at a loss—Evidence of loss—Valuation (Ireland) Act, 1852 (15 & 16 Vic., c. 63), secs. 11 and 12.* A school-house was held by trustees for the purpose of carrying on a secondary school for the children of people in comparatively humble circumstances. The income was derived from endowments, grants from the Ministry of Education, and pupils' fees. By the terms of the trust the trustees were precluded from making any profit out of the school, and any surplus of income over expenditure was to be expended and applied for school purposes, it was also required that "free places" should be awarded to at least two pupils each year. In the year 1941 most of the

pupils available for the school could not pay fees, and the number who held "free places," awarded by examination, exceeded the number of those who paid fees; as a result of that and other causes the income of the school ceased to be sufficient to meet the expenses. On an appeal by the trustees against the valuation of the premises the County Court Judge in determining the valuation took into account that the school was carried on at a loss in 1941. *Held*, that evidence that the school had been carried on at a loss ought not to have been received in ascertaining the rateable value of the premises. *Macdonald v. Commissioner of Valuation for Northern Ireland*. .. K.B.D. 14

WILL—CONSTRUCTION—*Sole trustee—Trust for A. and on A.'s death the decision left to the trustee—Absolute gift to A.* Testator by his will appointed a sole executor and trustee. After providing for the payment of his debts and funeral and testamentary expenses, the testator directed that all his property should be held in trust for his sister, and on her decease the ultimate decision with regard to the property should be with the trustee. *Held*, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.J.J.), that the testator's sister took an absolute interest in the property. *Davey v. Byrne*. .. C.A. 6

